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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

No. 182

KENNETH C. GORDON AND KENNETH J. MACLEOD,
PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 7, 1952

CERTIORARI GRANTED OCTOBER 13, 1952

IN THE
Supreme Court of the United States

OCTOBER TERM, 1951.

No.

KENNETH C. GORDON AND KENNETH J. MACLEOD,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

✓

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT.

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TRANSCRIPT OF RECORD

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 10439

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

vs.

KENNETH C. GORDON and KENNETH J. MACLEOD,

Defendants-Appellees.

U. S. C. A.-7

FILED

DEC 1 1951

KENNETH J. GARRICK

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.

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TRANSCRIPT OF RECORD FILED SEPT. 5, 1951
PRINTED RECORD

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 10439

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

vs.

KENNETH C. GORDON and KENNETH J. MACLEOD,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.

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1 **PLEAS** had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Room in the City of Chicago in the Division and District aforesaid on the first Monday of June (it being the 4th day thereof) in the Year of Our Lord One Thousand Nine Hundred Fifty-One and of the Independence of the United States of America, the 175th Year

Present: Honorable John P. Barnes, District Judge
Honorable Philip L. Sullivan, District Judge
Honorable Michael L. Igoe, District Judge
Honorable William J. Campbell, District Judge
Honorable Walter J. La Buy, District Judge
Honorable William H. Holly, District Judge

Roy H. Johnson, Clerk

Thomas P. O'Donovan Esquire, Marshal

Tuesday, June 19, 1951

Court met pursuant to adjournment

Present: Honorable William J. Campbell, Trial Judge

2 *Statement in Accordance with Rule 10-B of Court
of Appeals*

2

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 50 CR 641) • •

STATEMENT IN ACCORDANCE WITH RULE 10-B
OF THE COURT OF APPEALS.

1. This action was commenced by the return of indictment on December 1, 1950 by the Grand Jury of the Northern District of Illinois at Chicago, Illinois.

2. The original parties were United States of America v. Kenneth Gordon, Kenneth MacLeod and Albert Swartz.

3. Albert Swartz was dismissed on motion of the Government prior to the trial on May 28, 1951.

4. The defendants Gordon and MacLeod voluntarily surrendered and furnished bail on the indictment in the sum of \$2,500.00 each.

5. The defendants Gordon and MacLeod entered pleas of not guilty on January 16, 1951. The trial began on May 29, 1951 and a verdict of guilty was returned by the jury on June 8, 1951, and judgment and sentence was imposed on June 19, 1951.

The case was tried before the Honorable William J. Campbell, Judge of Northern District of Chicago, Illinois at Chicago, Illinois, and the sentence imposed was ten (10) years each in the custody of the Attorney General of the United States.

6. No questions were referred.

7. Notice of Appeal was filed on June 28, 1951 on behalf of the Defendant-Appellants Gordon and MacLeod, and they are at large on bail in the sum of \$7,500.00 each, fixed by the Court of Appeals.

3

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 50 CR 641) • •

Be It Remembered, that, on to-wit, the 1st day of December, 1950 the above entitled action was commenced by the filing of the following Indictment, in the office of the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, in words and figures following, to-wit:

4

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 50 CR 641) • •

The November 1950 Grand Jury charges:

That on or about, to wit, July 20, 1950, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division,

Kenneth C. Gordon,

Kenneth J. MacLeod

and

Albert Swartz,

hereinafter called the defendants, did unlawfully, wilfully and knowingly have in their possession certain goods and chattels, to wit:

11 cartons—116 Kodak Film,

7 cartons—8 mm Kodachrome Roll Film,

1 carton —8 mm Kodachrome Magazine Film and

5 cartons—16 mm Kodachrome Movie Film,

which said goods and chattels had been theretofore unlawfully stolen, taken and carried away from a certain motor vehicle of the Interstate Motor Freight System, a corporation common carrier, on or about, to wit, July 10, 1950, at Chicago, Illinois, while said goods and chattels were moving as part of an interstate shipment of freight from, to wit, Rochester, State of New York, to, to wit, Chicago, State of Illinois, all of which said goods and chattels were then and there in the care, custody, control and possession of the Interstate Motor Freight System, a corporation common carrier.

And the said defendants at the time they had in their possession the said goods and chattels, as aforesaid, in the Northern District of Illinois, Eastern Division, then and there well knew the same to have been stolen: in violation of Section 659, Title 18, United States Code.

4

Indictment

5

COUNT TWO.

The November 1950 Grand Jury charges:
That the defendants,

Kenneth C. Gordon,
Kenneth J. MacLeod
and

Albert Swartz,

on or about, to wit, July 20, 1950, did unlawfully, wilfully and knowingly transport and cause to be transported in interstate commerce, that is, from the City of Chicago, in the State of Illinois, to the City of Detroit, in the State of Michigan, certain merchandise theretofore stolen, that is to say, the merchandise more specifically described and set forth in the first count of this indictment, which said description of said merchandise is incorporated herein by reference as though more fully set forth and made a part hereof, and which said merchandise was then and there of the value of more than \$5000.00, and the said defendants then and there knowing the same to have been stolen at the time the said merchandise was transported as aforesaid: in violation of Section 2314, Title 18, United States Code.

6

COUNT THREE.

The November 1950 Grand Jury further charges:
That the defendants,

Kenneth C. Gordon,
Kenneth J. MacLeod
and

Albert Swartz,

on or about, to wit, July 27, 1950, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, did unlawfully, wilfully and knowingly have in their possession certain goods and chattels, to wit:

20 cartons—8 mm Kodachrome Roll Film,
which said goods and chattels had been theretofore unlawfully stolen, taken and carried away from a certain motor vehicle of the Interstate Motor Freight System, a corporation common carrier, on or about, to wit, July 10, 1950 at Chicago, Illinois, while said goods and chattels were moving as part of an interstate shipment of freight, from, to wit, Rochester, State of New York, to, to wit, Chicago, State of Illinois, all of which said goods and chattels were then and there in the care, custody, control and possession of the Interstate Motor Freight System, a corporation common carrier.

And the said defendants at the time they had in their possession the said goods and chattels, as aforesaid, in the Northern District of Illinois, Eastern Division, then and there well knew the same to have been stolen: in violation of Section 659, Title 18, United States Code.

7. COUNT FOUR.

**The November 1950 Grand Jury further charges:
That the defendants,**

**Kenneth C. Gordon,
Kenneth J. MacLeod
and**

Albert Swartz,

on or about, to wit, July 27, 1950, did unlawfully, wilfully and knowingly transport and cause to be transported in interstate commerce, that is, from the City of Chicago, in the State of Illinois, to the City of Detroit, in the State of Michigan, certain merchandise theretofore stolen, that is to say, the merchandise more specifically described and set forth in the third count of this indictment, which said description of said merchandise is incorporated herein by reference as though more fully set forth and made a part hereof, and which said merchandise was then and there of the value of more than \$5000.00, and the said defendants then and there knowing the same to have been stolen at the time the said merchandise was transported as aforesaid: in violation of Section 2314, Title 18, United States Code.

A True Bill:

Edw. G. Keehan

Foreman

Otto Kerner, Jr.

United States Attorney.

8 And afterwards, to wit, on the 16th day of January, 1951, being one of the days of the regular January term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

9

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 50 CR 641) • •

✓ This day comes the United States by the United States
Attorney come also the defendants Kenneth C. Gordon and
A. Kenneth J. MacLeod in their own proper persons and being

arraigned upon the Indictment filed herein against them plead not guilty thereto and it is

ORDERED that this cause be and the same is hereby set for trial on May 14, 1951.

10 And afterwards, to wit, on the 14th day of May, 1951, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

11

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 50 CR 641) • •

IT IS ORDERED that this cause be and the same is hereby held on the trial call subject to trial on June 11, 1951 and that this cause be and the same is hereby continued to June 11, 1951 for disposition as to defendant Albert Swartz.

12 And afterwards on, to wit, the 21st day of May, 1951 came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Motion in words and figures following, to wit:

13

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 50 CR 641) • •

MOTION.

Now comes the United States of America by Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, who upon information is advised that the calendar before the Honorable Michael L. Igoe is in a crowded condition in view of a case which has just commenced and in which it is anticipated the trial will last for some weeks;

It is further represented that the instant case is set for trial before the Honorable Michael L. Igoe on Monday, June 11, 1951; that it is in the interest of justice that the instant case be tried as soon as possible;

It is further represented that the bail in the instant case as to the defendants Gordon and MacLeod is set at \$2500.00, each. It is the opinion of the United States Attorney that bail as to each of the defendants, Gordon and MacLeod should be increased to \$25,000.00.

Now, Therefore, it is respectfully moved that this case be transferred to the Executive Committee of this Honorable Court for reassignment and move that the Executive Committee set the case for trial on the 28th of May, 1951; and further that the said bail as to the defendants Gordon and MacLeod be increased from \$2500.00 to \$25,000.00 each.

Otto Kerner, Jr.

United States Attorney

14 And on the same day, to wit, the 21st day of May, 1951, came the Defendant, Kenneth Gordon by his attorneys and filed in the Clerk's office of said Court his certain Petition For Continuance in words and figures following, to wit:

15

IN THE UNITED STATES DISTRICT COURT
• • (Caption—No. 59 CR 641) • •

PETITION FOR CONTINUANCE.

Now comes the defendant, Kenneth Gordon, and shows unto the Court that this cause is now set for trial on June 11, 1951; that the defendant was arraigned and entered his plea of not guilty herein on January 16, 1951, and that the cause has never been continued on his Motion.

Your petitioner further shows that there is attached hereto and made a part hereof newspaper articles which appeared in various newspapers circulated in the City of Chicago on May 17, 1951; that because of the highly inflammatory and prejudicial nature of the content of said newspaper articles, the petitioner cannot, if this cause is tried at this time, receive a fair and impartial trial.

Your petitioner further shows that since the publication of the aforementioned newspaper articles, the prosecution has served Notice upon counsel for the petitioner of a Motion to advance this cause for trial and to increase the bail of the petitioner; that the arguments to be advanced in sup-

port of said Motions will be predicated upon the events set forth in said newspaper articles; that the publicity which will be attendant upon the hearing of said Motions will further prejudice the cause of your petitioner and his right to a fair trial.

Your petitioner further shows that he has no knowledge or information concerning the events appearing in said newspaper articles and that the Motions of the prosecution are but an attempt on the part of the prosecution to prejudice the cause of petitioner and deprive him of a fair and impartial trial.

16. Wherefore, your petitioner prays that the above entitled cause may be continued to such time as to the Court shall seem meet so that he may not be prejudiced in his trial by reason of the aforementioned newspaper articles and the action of the United States Attorney pursuant thereto.

Kenneth Gordon
Petitioner

State of Illinois)
County of Cook) ss:

Kenneth Gordon, being first duly sworn on oath, deposes and says that he is the petitioner named in the above and foregoing Petition by him subscribed; that he has read the same, knows the contents thereof and that the matters and things therein stated are true in substance and in fact.

Kenneth Gordon

Subscribed and Sworn to before
me this 21st day of May, A.D.
1951.

Loretta Wingerling
(Seal) . Notary Public

17. Chicago Daily News, Thursday, May 17, 1951

SLAY WITNESS IN U.S. CASE
Detroit Jeweler Shot; Accused
With 2 Here in Stolen Film Deal

Albert Schwartz, 43, a Detroit jeweler who was to testify in a federal court trial here next month, was shot to death early Thursday in Detroit.

Schwartz was shot three times. His body was found in the front seat of his auto parked in his garage.

.. Schwartz was to testify against Kenneth C. Gordon, 28, of 515 Roscoe st., owner of Liberal Jewelers, 21 E. Adams st., and Kenneth J. MacLeod, 37, of 1115 N. Lake Shore dr.

All three men were indicted last December on charges of possessing \$12,000 worth of camera film stolen from an interstate shipment.

.. Schwartz pleaded guilty last April 10 to his part in the deal.

At the time of Gordon's indictment, Assistant U.S. Attorney Robert J. Downing quoted him as saying:

"If I named everybody whose hot stuff I handled I'd involve every crook in Chicago."

Downing, in charge of prosecuting the case, said Schwartz' testimony would have helped "appreciably," but that his death "doesn't blow up the case."

Downing said he would confer Thursday with U.S. Attorney Otto Kerner Jr. about providing protection for other witnesses.

Detroit jeweler James Erwin Marshall was indicted in that city in the same case.

After he pleaded guilty last Nov. 29, he was shot and wounded. His assailant now is in prison.

Gordon's father Meyer, 56, is serving 20 years for being a receiver of stolen jewelry.

INFORMER KILLED BY THEFT GANG

Detroit, May 17.—(Special)—Albert Swartz, Detroit jeweler who turned informer against two confederates named in a federal indictment in Chicago for theft of camera film in interstate shipment, was found slain early today.

His body, with a bullet wound in the hand and another in his head, was found slumped in the front seat of his car, parked in the garage behind his home.

He had been arraigned Monday in Chicago with Kenneth Gordon, 28, of 515 Roscoe st., owner of a Chicago Loop jewelry store, and Kenneth J. MacLeod, 37, of 1150 Lake Shore dr., owner of a girls' rooming house in Chicago.

The three men's trial was postponed to June 11, said Robert J. Downing, assistant United States attorney, who was reached by Detroit police in his Chicago suburban home.

10 *Newspaper Articles (Attached to Petition)*

Downing said Swartz had offered to testify against his companions at their trial. The prosecutor said another member of the gang, John Mundo, 37, of 7846 Dobson av., Chicago, was sentenced Monday in Ferndale, Mich., for the shooting of James L. Marshall, a jeweler there.

AMBUSH, SLAY JEWELER NAMED IN THEFT CASE

A wholesale jeweler from Detroit, scheduled to testify at a U.S. District court trial here later this week, was shot to death in the Michigan city Thursday, six months after another witness in the case was wounded.

The victim was Albert Schwartz, 43. His body, with two bullets in it, was found in the front seat of his auto parked in his garage.

Asst. Atty. Robert J. Downing of the local office said Schwartz and two Chicagoans were under indictment on a charge of receiving stolen goods. The Chicagoans were Kenneth Gordon, owner of a jewelry store at 21 E. Adams, and Kenneth McLeod, of 1150 Lake Shore.

The stolen goods involved was 127 cartons of film taken July 10 from a motor freight warehouse on the West Side. According to the indictment, Gordon and McLeod sold some of the stolen film to Schwartz and a James Marshall.

Last November Marshall pleaded guilty and shortly thereafter was shot outside his home in Ferndale, a suburb of Detroit. He recovered.

In 1948 Gordon and five other men were indicted as receivers of loot from a daring \$67,000 jewel robbery in Birmingham. A short time before that Gordon's father, Meyer, lost a long court fight to avoid serving 20 years in prison for financing jewel thieves and buying stolen gems from them.

18 And on the same day, to wit, on the 21st day of May, 1951, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

19

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 50 CR 641) • •

On motion of the United States Attorney it is ORDERED that this cause be and the same is hereby transferred to the Executive Committee of this Court for re-assignment and it is

Further Ordered that motion of the United States Attorney to increase bail and motion of the defendant Kenneth C. Gordon for continuance of trial date be and the same are hereby entered and continued generally.

20 And on the same day, to wit, on the 21st day of May, 1951, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, and Michael L. Igoe, Executive Committee, appears the following entry, to wit:

21

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 50 CR 641) • •

IT IS ORDERED that the above entitled cause be re-assigned to Judge William J. Campbell and set for trial on May 28th, 1951 at 10 o'clock A. M.

John P. Barnes

Igoe

Executive Committee

Dated May 21, 1951.

22 And afterwards on, to wit, the 23rd day of May, 1951 came the Defendant, Kenneth C. Gordon by his attorneys and filed in the Clerk's office of said Court his certain Motion To Dismiss Indictment, in words and figures following, to wit:

23

IN THE UNITED STATES DISTRICT COURT

• • • (Caption--No. 50 CR 641) • •

MOTION TO DISMISS INDICTMENT.

Now comes the defendant, Kenneth C. Gordon, by George F. Callaghan, his Attorney, and moves to dismiss the indictment, and each count thereof, for the following reasons:

1. The said indictment does not, nor does any count thereof, inform this defendant of the nature and cause of his accusation, with the certainty required by law.

2. The said indictment does not, nor does any count thereof, charge or aver the commission of acts by this defendant, constituting any offense against any statute of the United States with the certainty required by law.

3. The said indictment, and each count thereof, is vague, indefinite and uncertain and, therefore, insufficient, for that the said indictment, or any count thereof, does not sufficiently aver or charge the elements or the supposed crime or offense therein attempted to be charged and it is impossible for this defendant to prepare a defense thereto.

4. The allegations of the indictment, and of each count thereof, are so uncertain and indefinite that they violate the requirements of the Sixth Amendment to the Constitution of the United States of America.

5. Count 1 and Count 3 of the indictment constitute but a single offense.

24 6. Count 2 and Count 4 are duplicitous and void in that they charge the defendant with transporting and causing to be transported in interstate commerce the merchandise described in said Counts.

7. Count 2 and Count 4 fail to charge any offense for the reason that it is not made an offense under Section 2314 of Title 18 to "cause to be transported" stolen merchandise.

Kenneth Gordon, Defendant
By: George F. Callaghan
George F. Callaghan
Attorney for Defendant

25 And on the same day, to wit, on the 23rd day of May, 1951, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell, District Judge, appear the following entries, to wit:

26

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 50 CR 641) • •

This day comes the United States by the United States Attorney come also the defendants by their counsel and the Court being fully advised it is

ORDERED that the motion of the defendants heretofore entered herein for a continuance of the trial date of this cause be and the same is hereby denied and it is

Further Ordered that leave be and is hereby given the defendants to file motion to dismiss, instanter and that said motion be and is hereby set for hearing on May 28, 1951.

27

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 50 CR 641) • •

This cause coming on for hearing on the motion of the Government to increase the bonds of the defendants Kenneth C. Gordon and Kenneth J. MacLeod from the sum of Two Thousand Five Hundred Dollars (\$2,500.00) to the sum of Twenty-Five Thousand Dollars (\$25,000.00) each come the parties by their attorneys respectively and the Court having heard the arguments of counsel and being fully advised it is

ORDERED that said motion be and the same is hereby denied.

28 And afterwards on, to wit, the 28th day of May, 1951 came the Defendants Kenneth C. Gordon and Kenneth J. MacLeod by their attorneys and filed in the Clerk's office of said Court their certain Motion in words and figures following, to wit:

29

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 50 CR 641) • •

MOTION.

Now come Kenneth C. Gordon and Kenneth J. MacLeod, by their attorneys, and move the Court for an Order directing the United States to furnish the particulars regarding the following matters to the Defendants forthwith:

1. How many packages or items were contained in each of the cartons referred to in Counts 1, 2, 3 and 4?

2. What is the manufacturer's price on said items in the quantities in which the particular items were sold?

3. What is the manufacturer's price of each kind of film mentioned in the Counts of the Indictment?

4. What was the manufacturer's price of each kind of film mentioned in the Indictment on the date that it was sold, and on the date that it is alleged to have been stolen?

George F. Callaghan

Maurice J. Walsh

30 And on the same day, to wit, on the 28th day of May, 1951, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell, District Judge, appears the following entries, to wit:

31

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 50 CR 641) • •

This cause coming on for hearing on the motion of the defendant Kenneth C. Gordon to dismiss, which motion is joined in by the defendant Kenneth J. MacLeod, comes the United States by the United States Attorney come also the defendants in their own proper persons and by their counsel and the Court having heard the arguments of counsel and being fully advised it is

ORDERED that the motion to dismiss be and the same is hereby denied as to each defendant and thereupon this cause came on for hearing on the defendant's motion for a bill of particulars and the Court having heard further arguments and being fully advised it is

Further Ordered that the Government be and it is hereby directed to furnish such particulars as appear in the Official Court Reporter's transcript of this day's hearing and that the motion of the defendants that the Government elect whether it shall proceed on Count 1 or Count 3 of the Indictment be and the same is hereby denied.

32

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 50 CR 641) * *

This cause being called for trial comes the United States by the United States Attorney come also the defendants Kenneth C. Gordon and Kenneth J. MacLeod in their own proper persons and by their counsel and the United States Attorney suggests the death of defendant Albert Swartz therefore on motion of the Government it is

ORDERED that the Indictment herein be and the same is hereby dismissed as to defendant Albert Swartz and the defendants Kenneth C. Gordon and Kenneth J. MacLeod having heretofore interposed pleas of not guilty to the Indictment filed herein against them for their defense put themselves upon the country and it is.

Ordered that a Jury come whereupon come a Jury of twelve good and lawful men and women, to-wit:

Ruth E. Fritz

Anna A. Colditz

Samuel H. Newman

Joseph Gill

Norma E. Reszel

Emma I. Dreher

Raymond C. Eagan

Helen M. Lyman

Robert R. Harmer

Betty Vawter

Ida Potts

Edith Siegel

who were duly elected, empaneled and sworn well and truly to try the issues joined herein and a true deliverance to make between the United States of America, Plaintiff, and Kenneth C. Gordon and Kenneth J. MacLeod, defendants and a true verdict to render according to the law and evidence and it appearing to the Court that the trial of this cause is likely to be a protracted one it is.

Ordered that one additional Juror to be known as an Alternate Juror be empaneled and sworn at this time whereupon comes Eleanore Y. Weiss who is duly elected, empaneled and sworn as an Alternate Juror well and truly to try the issues joined herein and a true deliverance to make between the United States of America, plaintiff, and Kenneth C. Gordon and Kenneth J. MacLeod, defendants, and a true verdict to render according to the law and evidence and trial of this cause proceeds and the hour of adjournment having arrived it is

Ordered that the Jury and Alternate Juror be permitted to separate until 10:00 o'clock A. M. May 29, 1951.

33 And afterwards on, to wit, the 29th day of May, 1951 there was filed in the Clerk's office of said Court a certain Government's Response To Motion For Bill Of Particulars, in words and figures following, to wit:

34

Type	Quantity Per Carton	Omit	Retail Price Carton
#116 Verichrome Kodak Film	300 rolls	.49	147.00
# 8mm Kodachrome Magazine	50 magazines	5.05 per mag.	252.50
# 8mm Kodachrome Roll	100 rolls	4.10	410.00
# 16mm Comm. Kodachrome Film	50-100 ft. rolls	.0735 ft.	367.50

35 And on the same day, to wit, on the 29th day of May, 1951, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell, District Judge, appears the following entry, to wit:

36

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 50 CR 641) • •

This being the day to which this cause was continued for further trial again comes the United States by the United States Attorney come also the defendants in their own proper persons and by their counsel and enter herein their motion to withdraw a Juror and declare a mis-trial and the Court being fully advised said motion is denied and the

Jury and Alternate Juror heretofore elected, empaneled and sworn herein for the trial of this cause also come and trial of this cause proceeds and during the examination of witnesses on behalf of the United States the hour of adjournment having arrived it is

ORDERED that the Jury and Alternate Juror be permitted to separate until 10:00 o'clock A. M. May 31, 1951.

37 And afterwards, to wit, on the 31st day of May, 1951, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell, District Judge, appears the following entry, to wit:

38

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 50 CR 641) * *

This being the day to which this cause was continued for further trial again comes the United States by the United States Attorney, come also the defendants in their own proper persons and by their counsel and enter herein their motion to withdraw a Juror and declare a mis-trial which motion is denied and the Jury and Alternate Juror heretofore elected, empaneled and sworn herein for the trial of this cause also come and trial of this cause proceeds and during the further examination of witnesses on behalf of the United States the hour of adjournment having arrived it is

ORDERED that the Jury and Alternate Juror be permitted to separate until 10:00 o'clock A. M. June 1, 1951.

38 And afterwards on, to wit, the 19th day of July, 1951 there were filed in the Clerk's office of said Court two certain Volumes Of Transcript Of Proceedings Had On May 28, 29, 31, June 1, 4, 5, 6 and 7, 1951, before the Honorable William J. Campbell, Judge in words and figures following, to wit:

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 50 CR 641) * *

TRANSCRIPT OF PROCEEDINGS

39 Transcript of Proceedings had and evidence taken on the trial of the above-entitled case before the Hon-

orable William J. Campbell, one of the Judges of said Court, and a jury, in his court room, U. S. Court House, Chicago, Illinois, on Monday, May 28th, 1951, at 2:00 o'clock p. m.

Present:

Hon. Otto Kerner, Jr.,
U. S. District Attorney,
by Robert J. Downing,
Assistant U. S. Attorney,
on behalf of Government;
Mr. George F. Callaghan,
appeared on behalf of
defendant Gordon;
Mr. Maurice J. Walsh,
appeared on behalf of
defendant MacLeod.

40 The Court: Gentlemen, I understand the jury now in the box is satisfactory to both sides. That is as to the main panel, is that correct?

Mr. Downing: That is correct.

The Court: For the defendants?

Mr. Callaghan: Yes.

Mr. Walsh: Yes.

The Court: Your defendant?

Mr. Walsh: Yes.

The Court: Very well. Let the record so show.

The jury may rise and be sworn.

(Thereupon the twelve jurors were sworn to try the issues.)

The Court: We will take a recess of ten minutes so the jury can be escorted to their quarters.

I would like during this recess to speak to counsel in chambers about the matter of alternates. Will you step in chambers, Gentlemen?

(And thereupon proceedings were had in chambers between court and counsel, not reported, following which the additional proceedings were had in the court room:)

The Court: It having been agreed between counsel that one alternate will be selected, in view of the possible protracted nature of the trial, you have now selected
41 that alternate, have you, Gentlemen?

Mr. Downing: Yes, your Honor.

The Court: She is satisfactory to both sides?

Mr. Walsh: Yes.

The Court: Both defendants?

Mr. Callaghan: Yes.

The Court: You may rise and be sworn as an alternate juror.

(And thereupon the alternate juror was sworn.)

The Court: Step into the jury room with the others, please, and then you can arrange a chair. Your chair will be over on the far side. I think we will put one in there over against the pillar.

(And thereupon the alternate juror retired to the jury room, and the following proceedings were had in the court room out of the hearing and presence of the entire jury.)

Mr. Downing: Let the record show that at the request of the defendants this morning this has been supplied to them this noon.

The Court: Yes.

Mr. Downing: The Government has supplied to Mr. Walsh and to Mr. Callaghan a list, penciled list containing the description of the type of film cartons, the quantity in the carton and the unit and the carton retail price.

Mr. Walsh: We object that it does not satisfy the request we made, but I believe it does satisfy your Honor's order.

The Court: Yes. It complies with such as I said they should furnish.

Mr. Walsh: They have furnished it with a retail price.

The Court: Yes. That is what I directed them to. They said that was the only price they had.

Mr. Walsh: Do I understand that this is the price upon which the Government will rely for its proof in the case? That would be the purpose of the bill of particulars.

The Court: This is what you are going to introduce?

Mr. Downing: This is what we are going to introduce.

The Court: Very well. Whatever you want to introduce in the form of evidence we will hear. If there are any motions at the end of all the evidence, I will pass on that at that time.

Are you ready to go ahead with the opening statement?

Mr. Downing: Yes, your Honor.

53 The Court: Bring in the jurors, please, Mr. Marshal.
Mr. Callaghan: May it please your Honor, in this morning's Tribune the following story appears:

"A jury of eight women and four men was selected yesterday before Federal Judge William J. Campbell in the trial of Kenneth Gordon, 28, of 515 Roscoe st., and Kenneth MacLeod, 37, 1150 N. Lake Shore dr., charged with possessing \$12,000 in stolen camera film.

"The trial was advanced two weeks ahead of its scheduled opening at the Government's request after Albert Swartz, 43, a Ferndale, Mich., jeweler who had pleaded guilty to the same charge and was scheduled to testify against Gordon and MacLeod, was slain May 17 in gangland fashion outside his home. James I. Marshall, 29, a Ferndale jeweler who was wounded in a similar attack last Nov. 20, has been under guard since Swartz' death.

"Government attorneys charged Gordon and MacLeod sold the film to Swartz and Marshall after it was stolen from a truck parked at 1833 S. Canal st. last July 20. The loot was part of a shipment valued at \$27,423, consigned from the Eastman Kodak Company, Rochester, N. Y., to its Chicago branch office."

54 Now, on the appearance of that article, and I assume there have been similar articles in other morning papers, but the defendants now move this Court to withdraw a juror and declare a mistrial on account we cannot have a fair and impartial trial by this jury.

The Court: Motion denied.

Mr. Callaghan: May I merely make this as a part of the record?

The Court: File it in writing and attach it as an exhibit at any time during the day.

Mr. Walsh: Yesterday we made a motion for a bill of particulars. Mr. Downing furnished me with this penciled written slip of paper yesterday, showing certain prices. I would like to have leave to make this a part of the record, showing what he has furnished us.

The Court: You may so do. What do you mean you want?

Mr. Walsh: Just let him copy these figures as being the ones furnished in response to our request for a bill of particulars.

The Court: There is no question but what those are the only ones furnished. Mark it as an exhibit, if you want to. You can retain it as part of the record of the case and file it as an exhibit. Just file the exhibit. It would not go to the jury, of course.

Mr. Walsh: It is part of the pleadings.

The Court: Let it be filed here, and bring in the jury.

55 (The following proceedings were had in the presence and hearing of the jury in the court room:)

Thereupon, The Government, To Maintain The Issues On Its Part, Introduced The Following Evidence, To-Wit:

CHARLES H. VAYO, called as a witness on behalf of the Government herein, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Downing:

Q. Will you state your name, please?

A. Charles H. Vayo.

Q. What is your business address, Mr. Vayo?

A. 343 State street, Rochester, New York.

Q. By what company are you employed?

A. Eastman Kodak Company.

Q. How long have you been employed by that company?

A. Thirty-eight years.

Q. What is your present position?

A. I am General Traffic Manager of the Kodak Company and all its subsidiary companies.

Q. For how long have you held such a position?

A. Oh, approximately fifteen years.

56 Q. Will you describe briefly, for the court and jury, the nature of your duties?

A. Well, I have charge of the purchase of all transportation for all of our companies and included in that is all of the shipping operations throughout the world.

Q. Now, in connection with your duties as General Traffic Manager for the Eastman Kodak Company, are you acquainted with the books and records of that company?

A. I am.

Q. I now show you an exhibit which has been marked as Government's Exhibit 67 for identification, and ask you to look at it and ask you if you have seen it before?

A. Yes, I have.

Q. I will ask you if that document is a record of the Eastman Kodak Company?

A. Yes, it is.

Q. I ask you with respect to that document, if it was prepared under your jurisdiction and supervision, in the regular course of business on or about the date the document bears, which is July 8, 1950?

A. It was.

Q. Was it the regular course of business to prepare such a document on or about that date?

A. It was.

Q. Directing your attention to the name of C. H. Vayo, appearing thereon, I will ask you if that is your name?

57 A. That is correct.

Q. Do you recall if this is the same impression of your name?

A. A facsimile of my signature.

Q. Was that placed thereon by an authorized employee, under your supervision and direction in the regular course of business?

Mr. Callaghan: That is objected to unless he was present at the time it was done.

The Court: Overruled.

By The Witness:

A. Yes.

By Mr. Downing:

Q. Will you describe briefly to the Court and jury what that document represents?

Mr. Walsh: I object to that. The document will speak for itself, your Honor, I assume.

The Court: He may briefly describe what the document is. Do not read it in detail.

By The Witness:

A. The document is a contract between the Eastman Kodak Company and the carrier, in this case the Interstate Motor Freight Lines.

Q. Was that document in your custody and control until it was turned over by you to the United States District Court in Detroit, Michigan?

58 A. Yes, it was.

Q. I now show you two exhibits marked Government's Exhibits 68 and 69, marked for identification, and ask you to look at those and ask you if those are the type of seals used by the Eastman Kodak Company?

Mr. Callaghan: I object to counsel leading this witness repeatedly. Let the witness testify.

The Court: It is more or less pro forma. I will permit the question to stand.

By The Witness:

A. They are the type of seals that we used.

By Mr. Downing:

Q. Now, in connection with what business did your company use those seals?

A. What was the question?

Q. In connection with what type of business did your company use those seals?

A. They are used in connection with the sealing of trucks and freight cars.

Q. With respect to those seals, Government's Exhibits 68 and 69, marked for identification, what relationship if any, is there between those and the exhibits which I have just previously shown on Government's Exhibit 67 marked for identification?

59 A. These are the seals that we use on the trucks as indicated by this bill of lading.

Q. By the bill of lading, you are referring to Government's Exhibit 67?

Mr. Callaghan: All the witness can possibly testify to that is the same numbers perhaps correspond. He is not competent to testify that these are the seals that are used, and so on. He had nothing to do with the placing of those seals or affixing them to any carrier.

The Court: Overruled.

Mr. Downing: Was the question answered?

The Court: Yes.

By Mr. Downing:

Q. Directing your attention to Government's Exhibit 76, marked for identification, I ask you to look at that and ask you if that is a record of the Eastman Kodak Company?

A. Yes, it is.

Q. And ask you with respect to that record whether that was prepared under your jurisdiction and supervision in the regular course of business on or about the date the document bears, July 8, 1950?

Mr. Callaghan: I submit that the witness ought to be required to testify how it was prepared and then we can reach that conclusion.

60 The Court: Overruled. I will let him answer.

By The Witness:

A. Yes, it was prepared.

By Mr. Downing:

Q. Was it the regular course of business to prepare such records at that time?

A. It was.

Q. Now, after the record there, Government's Exhibit 76 was prepared, if you know, what distribution was made of that document?

Mr. Walsh: I object to the question. As I understand it, as to what distribution is made—

The Court: Was made of this document.

Mr. Downing: Was made of this document.

The Court: Overruled. He may answer.

By The Witness:

A. A copy of this record was forwarded at the time the shipment was made. This particular copy was held in Rochester. In other words, it is a duplicate.

By Mr. Downing:

Q. Is such record, a copy of such record, forwarded to your branch?

A. A copy of such record was forwarded to the Eastman Kodak Company in Chicago.

61 Q. Without referring to the contents of that record, will you describe briefly what that document reveals?

A. This refers to a shipment of six cases of Kodochrome commercial film, emulsion 5268-176.

Mr. Callaghan: Was that emulsion—

A. That is emulsion number 5268-176.

By Mr. Walsh:

Q. That is emulsion number 5268-176?

Mr. Downing: 5268-176.

By Mr. Downing:

Q. With respect to the document, what, if any, relationship is there between that document and the document that you first identified, Government's Exhibit 67?

A. This?

Q. Yes, the bill of lading that you identified.

A. This is, this one here shows—

Mr. Callaghan: "This one here", you refer to 67?

The Witness: I refer to 67, the bill of lading, shows the shipment by case numbers of 355, 56, 57, 58, 59 and 60. In other words, the items covered by this particular document are shown on the bill of lading.

By Mr. Downing:

Q. By the particular document, you are referring to Government's Exhibit 76?

A. Yes, that is right.

Q. So those case numbers that you have just itemized, are they listed on the document, Government's Exhibit 76 there? That is this document here?

A. Yes, they are.

Q. Are they in the first column there to the left hand side of that document? Is that where the case numbers are?

A. The case numbers 55, 56, 57, 58, 359 and 360.

Q. Now, in connection with your duties, are you acquainted with the type of carton used by the Eastman Kodak Company in shipping film?

A. Yes, I am.

Q. Directing your attention to a carton identified as Government's Exhibit 1, marked for identification, I ask you to look at that and ask you if you recognize that to be a type of carton of the Eastman Kodak Company?

A. Yes. It is the regular Kodak carton.

Q. Directing your attention to Government's Exhibit 1, that is the carton which I have just shown you, was that included in the shipment which is evidenced by Government's Exhibit 67?

Mr. Callaghan: That is objected to, if your Honor please.

63. The Court: On what ground?

Mr. Callaghan: On the ground he is not competent to so testify, not having personal knowledge of the subject-matter.

The Court: Objection overruled.

Mr. Callaghan: He perhaps could show that by reason of documents or some other conclusion he reaches and by the same mental process, they may say he is competent to testify, but he is not competent to testify it was a part of this shipment.

The Court: Objection overruled.

Mr. Walsh: I might suggest, further, your Honor, on the same objection, that I think a man who handles or is in charge of their transportation all over the world is a little too big to be familiar with the details to which he is testifying. He says they are under his general jurisdiction, but obviously not under his immediate supervision, so that he could have a knowledge of the specific persons, but if he could tell us the name of the person of his own knowledge—

The Court: Are you making an objection?

Mr. Walsh: Yes.

The Court: Overruled.

64 Mr. Downing: Will you read the question?

(The last question was read by the Reporter, as recorded above.)

By Mr. Downing:

Q. Will you explain to the court and jury the basis for your answer, please?

A. This is number 356.

Q. By that, are you referring to some number on the exhibit?

A. 356 is the case number.

Q. By that you are referring to a number on Government's Exhibit 1?

A. On the bill of lading.

Q. Yes?

A. It is further identified by the emulsion number 5268-176-0515. Now—

Q. Go ahead and explain.

A. Explain the emulsion number in process?

Q. Please.

A. 5268 indicates the type of film, that is, whether it is black and white or colored or what have you.

176 is the emulsion number and the first two digits of the last number, 0515, 05 indicates the large roll from which this film was cut. 15 indicates the packer.

65 Q. From your knowledge of the records of the company, the film of that emulsion number included in this shipment, evidenced by Government's Exhibit 67, this bill of lading?

A. Yes. That particular lot of film was special emulsion made for the professional motion picture film industry. A number of rolls were shipped to New York and Chicago.

Mr. Callaghan: I object to this, if your Honor please.

The Court: Overruled. The answer may stand.

By Mr. Downing:

Q. With respect to the quantity shipped to New York, that you have mentioned, what, if anything, has happened to that, to your knowledge?

A. The film that was shipped to New York, according to my records—

Mr. Callaghan: I object to his testifying.

The Court: What is the materiality of what was shipped to New York?

Mr. Downing: I just want to show that film then was recalled and the only film with that emulsion number was in this particular shipment.

The Court: Very well. He may answer.

By The Witness:

66 A. The film shipped to New York was recalled and which left the only available film on this particular truck to Chicago.

Mr. Walsh: I object and move to strike the answer, unless he has testified to something of his own personal knowledge, if he recalled it. He is talking about something but he is apparently telling us and we don't know whether he knows it or not. It has not been established.

By Mr. Downing:

Q. Are you acquainted with those facts of your own knowledge?

A. Yes, sir.

The Court: Objection overruled.

By Mr. Downing:

Q. That emulsion number that you have just referred to, both on Government's Exhibit 1, the carton marked for identification, about which you have testified, is the number that is referred to on this exhibit as 76, marked for identification?

A. Correct.

Q. Directing your attention to the printed inscription appearing on the side of Government's Exhibit 1, marked for identification, what, if you know, does that print-
67 ing represent?

A. It represents the kind of film and the contents of that particular container or carton.

Q. Is it the general practice of the Eastman Kodak Company to print on each of their cartons such inscription describing the type of film and the quantity in each carton?

A. That is right.

Q. Now, from your inspection of Government's Exhibit 1 I have just shown you, will you look at it and determine whether or not this exhibit has heretofore been opened, once it has been packed and shipped?

A. There is no indication it has ever been opened.

Q. I ask you to open that in the court room, if you will please, Mr. Vayo.

A. It will take a strong man to do it. (Witness opening the carton.)

Q. That is sufficient.

Mr. Downing: Let the record show that the witness is opening the carton, Government's Exhibit 1 in the court room:

The Court: Very well. Let the record show.

By Mr. Downing:

Q. I ask you to look at the contents on the inside of 68 that exhibit, Mr. Vayo.

Are you able, after examining the contents, to determine by inspection if the contents of that exhibit, Government's Exhibit 1, marked for identification, is that of the same type of film as described on the outside of the box which you have previously referred to?

A. It is.

Q. Does the box contain fifty rolls of 100 foot 16 millimeter Kodochrome film?

A. It does.

Q. By inspection of the contents of the box, I ask you if you are able to determine and advise the court and jury if the contents is produced from emulsion number 5268-176, about which you have previously testified?

A. Yes, it is.

Q. Will you explain to the court and jury the basis for your answer?

A. Well, the cartons are marked with the emulsion 5268-176-0515, which is the emulsion number that we referred to.

Q. And each of the cartons on the inside of that exhibit, Government's Exhibit 1; are so marked, is that right?

A. That is right.

69 Q. Now, I show you exhibits which are identified as Government's Exhibits 2, 3, 4, 5 and 65, and ask you to look at those cartons and ask you if you recognize those to be cartons of the Eastman Kodak Company?

A. They are.

Q. Now, from the inspection of those cartons, I ask you if you are able to determine, as you previously explained in Government's Exhibit 1, if those cartons were included in the shipment evidenced by Government's Exhibit 67, marked for identification?

Mr. Walsh: I object on the ground stated. He is reciting a record that apparently is going to be introduced.

The Court: Your objection may be noted, and it is overruled.

Mr. Downing: Will you read the question?

(Last question read, as recorded above.)

By The Witness:

A. Yes.

Q. Now, at the time these cartons were shipped, according to your records, what type and quantity of film did each of these cartons contain?

A. Each carton contained 50 rolls of what is known as commercial Kodochrome film.

70 Q. That is, of 16 millimeter?

A. 16 millimeter.

Q. Now, directing your attention to Government's Exhibit 66, marked for identification, I will ask you to look at that and ask you if you recognize that as a product of Eastman Kodak Company?

A. Yes, it is.

Q. From an inspection of the box of film that you have before you, Government's Exhibit 66, are you able to determine that this was included in one of the cartons which I have just shown to you, Government's Exhibits 2 to 5, or Government's Exhibit 65?

A. Yes, it was.

Q. Your answer is yes?

A. Yes.

Q. Now, will you explain your answer?

A. Well, this particular carton that you have handed me has emulsion number 5268-1768515, which is the emulsion number of the film in these particular cases.

Q. And that is the carton, Government's Exhibit 66, which I have just shown you?

A. Yes.

Q. But you cannot identify at the present time which one of these cartons contained that box, which is Government's Exhibit 2 to 5?

71 A. This particular one?

Q. Yes.

A. No, I cannot.

Q. Mr. Vayo, I now show you a group of cartons, commencing with Government's Exhibits 6 to 16; I am handing you Government's Exhibit 6, which is marked for identification, and ask you to look at that, and then if you would

step down and look at the balance of these exhibits here, please.

A. Yes.

Q. Then would you look at the balance of these, marked Government's Exhibits 17 to 63?

A. Yes.

Mr. Callaghan: What is that, 6 to 16?

Mr. Downing: Yes, and this is 17 to 63.

Mr. Callaghan: 17 to 63?

Mr. Downing: Yes, 17 to 63.

Q. And would you take the witness-stand again, please? Now, after looking at these exhibits, which you have just inspected, do you recognize these to be cartons of the Eastman Kodak Company?

A. I do.

Q. And are these the type of cartons used by the Eastman Kodak Company in shipping film from their factory at Rochester to the various branches?

A. Various domestic branches, yes.

Q. And do each of the cartons that you have looked at contain a description of the type of film which are contained therein?

A. Yes, they do.

Q. From an inspection of this carton, are you able to determine whether the film of the type described thereon was included in the shipment evidenced by the bill of lading, Government's Exhibit 67?

Mr. Walsh: That is objected to, if your Honor please, on the ground that it has not been shown here that these cartons bear the numbers that appear on that document.

The Court: Overruled.

By The Witness:

A. All these various types of film were included in this particular shipment.

By Mr. Downing:

Q. Directing your attention to Government's Exhibit 64, marked for identification, I ask you to look at that, and ask you to inspect the contents in that exhibit, please.

Mr. Walsh: What number is that?

Mr. Downing: 64.

By The Witness:

A. Yes.

By Mr. Downing:

Q. And do you recognize that exhibit to contain the film of the Eastman Kodak Company?

A. Yes, I do.

Q. From an inspection of this exhibit in your records, are you able to determine that film of this type was included in the shipment by Government's Exhibit 67?

Mr. Callaghan: The same objection as to a similar question.

The Court: The same ruling.

By The Witness:

A. Yes, it was.

By Mr. Downing:

Q. Now, in the regular course of your duties, Mr. Vayo, are you acquainted with the quantity of film packaged in the shipping cartons, the exhibits which you have just identified here in the court room?

A. Yes.

Q. Are you also acquainted with the retail value of the various types of film that is manufactured and sold by the Eastman Kodak Company?

74 Q. Do you have with you the retail value of a carton of 16 millimeter Kodachrome commercial film?

A. Yes, I have.

Q. Do you have your records with you?

A. May I refer to my notes?

Mr. Downing: May he have permission to refer to his notes?

The Court: Yes, yes, he may.

The Witness: What is the particular film?

Mr. Walsh: Just a minute, now. What is the question?

By Mr. Downing:

Q. Do you have the retail value of the carton of 16 millimeter commercial Kodachrome commercial film?

Mr. Callaghan: Hasn't he answered that?

Mr. Downing: He says he has it.

Mr. Callaghan: He wants to refer to his notes.

Mr. Walsh: Then there is no question pending now?

The Witness: Yes.

Mr. Callaghan: I object, if he is going to read some values, I object to that stuff, whether he has it with him or not.

The Court: He may use the notes to refresh his recollection and then testify.

75 Mr. Downing: And then testify as to the value.

The Court: As to the retail value, on the question that he was asked.

Mr. Callaghan: Now, I object to that, your Honor, on the ground that there is no showing that this film was ever in the retail market, and that is not an issue in this case at all. This is a shipment of film from the Eastman Kodak Company to an Eastman Kodak Company branch, and it never arrived in the retail market.

The Court: The objection is overruled.

Mr. Callaghan: I submit there is a further objection, if your Honor please, he is referring to notes, without any showing as to when those notes were prepared, by whom they were made, or when they were prepared, or any other foundation that is required.

The Court: I think that objection is valid, and I will sustain it. You will have to qualify him.

By Mr. Downing:

Q. With respect to the notes that you have in front of you, are those notes which have been prepared under your supervision—

Mr. Callaghan: I submit, if your Honor please,
76 he should not lead the witness, let him testify as to how the notes were made.

The Court: Testify as to what the notes are.

The Witness: The notes, the values that I have per case were arrived at by means of using the prices taken from our regular price list, prices in effect on July 8th or thereabouts, 1950.

By Mr. Downing:

Q. Do you have that price book with you?

Mr. Callaghan: I submit the best evidence is the price list.

The Court: Let him use his notes, and he will probably come to it.

Q. Do you have a price list in front of you there?

A. Yes, I have.

Q. And was that the basis upon which you arrived at the computation of the price per carton?

A. That is correct.

Q. Now, what is the price per carton of the retail value of 16 millimeter commercial Kodachrome film in July, 1950?

Mr. Walsh: I object to that, if he is going to tell us

what is in a document which sets out the price that the Eastman Kodak Company charged, I submit we should have the document and the benefit of prices at all levels.

The Court: I will permit him to look at the document, and in the meantime, I will permit him to answer the question, and if, after referring to his notes, you want to look at that price list afterward, you may look at it.

Mr. Walsh: Furthermore, there is no showing that anyone has ever paid the prices for any of this film. If he is going to talk about market value—

The Court: Are you making a further objection?

Mr. Walsh: Yes, your Honor.

The Court: That is also overruled.

Mr. Walsh: The market value that he is going to testify to now is July 8th, so he says, is on the list, the retail list, which previously he says were prices that the Eastman Kodak Company assumed the retailers would obtain, but not the prices that the Eastman Kodak Company were going to obtain.

The Court: Yes, you have previously said that, and I have overruled your objection.

By Mr. Downing:

Q. And this price you have given, is that the price that was in effect throughout the month of July, 1950?

A. As a matter of fact, it was in effect for six months after July.

Q. Subsequent to July, 1950?

A. Yes.

Q. What is the price of one carton of 16 millimeter commercial Kodachrome film?

A. \$367.50.

Q. Now, how many boxes are there in a carton, of the type, of that type of film?

A. You mean how many rolls?

Q. Rolls.

A. There are fifty rolls to the case.

Q. Is that film also known as movie film?

A. Well, it is the type of film used in the professional movie field; it is a 16 millimeter type of film.

Q. Now, do you have the retail value of a carton, one carton of 116 Verichrome Kodak film?

Mr. Walsh: The same objection may be recorded to each of these questions, if your Honor please?

The Court: Yes, and the record will also show the same ruling.

By Mr. Downing:

Q. What is that price?

A. On the 116 Verichrome, the cost is \$147.

Q. How many rolls a carton?

79 A. There are 300 rolls a case, or carton.

Q. Now, do you have the retail value of one carton of 8 millimeter Kodachrome roll film?

A. What length 8 millimeter did you say?

Q. Which is a 25 foot—

A. Are you talking about magazine roll?

Q. No, roll, roll type.

A. I gave you a price of \$410 on a 25 foot 8 millimeter Kodachrome, if that is the one you are talking about.

Q. That is the one.

A. \$410 a case.

Q. How many rolls are there a case in that?

A. There are 100.

Q. Now, do you have the retail value of a carton of 8 millimeter Kodachrome magazine type of film?

A. That price is \$252.50.

Q. And how many magazines to a case?

A. Fifty in that particular type.

Mr. Downing: You may cross examine.

The Court: I think we will take the morning recess before you do that. Ten-minute recess.

(Recess)

The Court: Cross examination on behalf of the defendant Gordon.

By Mr. Callaghan:

Q. Did the cartons which have been identified here as Government's Exhibits 6 to 16, inclusive, for identification have on the outside thereof the emulsion number?

A. I believe they have.

Q. And so the jury may know what the emulsion number is, will you explain that to us briefly, what you mean by the emulsion number?

A. The emulsion number is, as I explained previously, you have a series of numbers. The first number indicates the type of emulsion, whether it is an emulsion used in the manufacture of black-and-white film or colored film.

Q. What do you mean by emulsion, that is what I want you to explain to the jury.

A. That is a photographic emulsion which goes over the celluloid, so to speak, that has photographic qualities, such as the silver and other qualities which enables you to get a picture.

Q. That is the bath in which the paper, the celluloid, is it acetate or acetate?

A. It could be acetate or it could be nitrate.

Q. The acetate, that is the bath in which the acetate material of which the film is to be made is run through that as it goes on the rollers to be cut?

A. No, it is not a bath at all. It is a coating.

81 Q. Well, an emulsion is a mixture in a large vat, through which this substance was run to get the coating?

A. No, it doesn't work that way at all.

Q. No.

A. The celluloid, so to speak, goes over certain rollers, and the emulsion is applied as the rollers go through it, the solvents evaporate and it becomes a solid substance.

Q. Then, briefly, the emulsion is the substance that is sprayed on, or in some means applied to the thing that eventually becomes film?

A. Yes, that is the photographic quality.

Q. Your silver bromide or silver nitrates may be applied to the substance in—

A. It is already in the emulsion.

Q. And in each emulsion—each emulsion has a number, does it not, so that you may keep track in the manufacture of the film what film, by designating each batch of film with the emulsion number?

A. That is right.

Q. Now, do you know how many rolls, or if you wish to give it by cartons, cartons of film were made out of emulsion No. 5268-176?

A. Yes, I do.

82 Q. How many?

A. May I refer to my notes?

Q. Yes.

The Court: You may.

By The Witness:

A. In that particular batch, there were 368 100-foot rolls made.

Q. What was that again, 368?

A. 368.

Q. Rolls?

A. Rolls, 100-foot rolls.

Q. Of what kind of film?

A. 16 millimeter Kodachrome commercial film.

Q. 16 millimeter Kodachrome commercial?

A. That is right.

Q. How many rolls of 16 millimeter Kodachrome commercial film were included in the shipment of July 8th, 1950, have you any independent recollection of that, Mr. Witness, or would you like to look at this exhibit?

A. No, I think I can refer to my notes here.

Q. Well, without looking at those notes, will you look at Government's Exhibit 67 for identification? The question is limited now to 16 millimeter Kodachrome 100-foot rolls.

83 A. Yes.

Q. Mr. Witness, I am asking you if you can answer the question by looking at Government's Exhibit 67.

A. Yes, they were included.

Q. That is not the question. How many?

A. Well, you are asking the question, the number of rolls?

Mr. Callaghan: Will you read the question, Mr. Reporter?

(Question read.)

The Court: What is your answer?

By The Witness:

A. 300.

By Mr. Callaghan:

Q. Now, do you know where the other 68 rolls were shipped?

A. Yes, as I said, there were a certain percentage of them, a certain number of rolls—

Q. If you know where the other 68 rolls were shipped, will you tell us, please?

A. I can only tell you in this fashion.

Q. You said you knew, do you know?

A. Well, I know from my records.

Q. Well, will you refer to your records and tell us, 84 where the 68 rolls were shipped?

A. They were shipped to Chicago.

Q. To whom in Chicago?

A. To J. E. Brulatour Company.

Q. Were those 68 rolls included in this shipment of July 8 on the same vehicle?

A. Yes.

Q. To a different consignee than the Eastman Kodak Company, is that so?

A. Yes, it was an enclosure.

Q. Sir?

A. What is known as an enclosure.

Q. Will you indicate for the court and jury for my edification, if you will, where on Government's Exhibit 67 it appears that there were 368 rolls of 16 millimeter Kodachrome film shipped?

A. That would not appear anywhere.

Q. It does not appear?

A. No, sir.

85 Q. You testified on direct examination you could tell from the waybill what this shipment comprised.

A. Did I?

Q. Yes.

A. I think in a general way, yes.

Q. In a general way.

Now, what other emulsion numbers are involved there in the various cartons and rolls of film that have been produced here in open court? Can you tell by inspection of any of the documents or by inspection of any of the exhibits here?

A. I haven't examined them, except these particular cases here as to emulsion numbers.

Q. Mr. Witness, is the 116 Verichrome film made from the same emulsion, or is the same emulsion used in the manufacture of the Verichrome?

A. No, it is not.

Q. Is the same emulsion used in the manufacture of the 8 millimeter Kodachrome film?

A. No, sir.

Q. Is the same emulsion used in the magazine film?

A. No, it is not.

Q. Do you have a record now presently, Mr. Witness, as to the total number of rolls of film which were
86 produced from an emulsion number 5268-176?

A. No.

Q. This number was used on 368 rolls, you say, included in this shipment, but the emulsion number was also used?

A. Will you give me the question again, please?

Q. I don't know which question you are talking about now. Do you want to explain some previous answer? You are talking about an emulsion number.

A. Yes.

Q. The only emulsion number I am talking about is 5268-176.

A. All right. What is your question, regarding it?

Q. You have testified here, if I understand your testimony correctly, that 368 rolls included in this shipment bore that emulsion number, is that true?

A. I think you are right.

Q. You will agree with that?

A. Yes, I think so.

Q. On how many other cartons of rolls of film manufactured by the Eastman Kodak Company at Rochester, New York, does a like emulsion number appear?

A. Well, there would be none except this particular film.

87. Q. Do you mean after these 368 films, 368 rolls of film, were manufactured that that emulsion number was then abandoned and not used again on any future film at all?

A. That is right.

Q. That is the fact?

A. Yes, sir.

Q. Do you have a record there in connection with this emulsion number 5268-176?

A. I have nothing to prove that except from my own personal knowledge of this particular film.

Q. You are not employed in the mixing room where this film is actually manufactured?

A. Of course I am not.

Q. Sir?

A. Of course I am not.

Q. How many employees does Eastman Kodak have in its Rochester, New York, plant?

A. About thirty thousand.

Q. You employ some fifty thousand people throughout your entire project, do you not?

A. That is right.

Q. Do you have a record of any other shipments that were made by the Eastman Kodak Company during the month of July, 1950?

88 A. To whom?

Q. To anyone whomsoever. Do you have any records with you—

A. Records here?

Q. Yes.

A. No, I haven't.

Q. Before leaving the Eastman Kodak Company to come here as a witness, did you examine the records of the Eastman Kodak Company for shipments of film to other persons during the month of July, on or about July 8, 1950?

A. Yes, I made some examination.

Q. Who is the person in charge of the plant at Rochester, who keeps track of the number of rolls of film that are made from a certain emulsion number or from a given emulsion number?

A. It all depends on the type of film involved. In other words, all film is not manufactured under the same supervision or in the same building.

Q. I see. There is not any one central supervising production man who would know the extent to which a certain emulsion was used on a given lot of film?

A. Well, you could probably find someone that would know that.

Q. Under whose supervision, for instance, was the
89 film manufactured that bears No. 5268-176?

A. The final responsibility would be the superintendent of film manufacture.

Q. Who would that be?

A. Well, it would be Mr. Otto Cook.

Q. Is that Cook, C-o-o-k?

A. That is right.

Q. Does he live in Rochester, New York?

A. He does.

Q. The number 0515 which is added to the emulsion number I am talking about, indicates what?

A. 15—

Q. 0515.

A. 05, the first two numbers, indicate the large roll from which this film, this small film, is slit. In other words, film coming off the production line comes in 40-foot rolls, and that is slit into the smaller 16 millimeter size, and the 05 indicates the roll number from which this particular film was slit.

Q. What does 15 indicate?

A. 15 indicates the packer who put it into the carton.

Q. The person who ultimately may be held responsible in the event there is something wrong with that packing?

It is an inspection proposition, the use of the 15, the 90 packer's number?

A. Yes, I should think so.

Q. How many rolls of film were manufactured bearing the emulsion symbol 5268-176-0515?

A. Just the amount that was shipped.

Q. How many?

A. The number of rolls?

Q. Yes.

A. I don't know. I will have to refer to my notes.

I am sorry, I haven't the total number of rolls. I don't know.

Q. How many rolls were included in this shipment?

A. There were 300. There were 300 100-foot rolls, and there was 60 400-foot rolls.

Q. And what millimeter film would that be?

A. That would be 16.

Q. Mr. Witness, can you tell by looking at any of the documents that have been marked for identification here as Government's Exhibits how many cartons of 116 Verichrome film were made by a given emulsion number?

A. No, I can't.

Q. What emulsion number, by the way, is indicated for the 116 Verichrome film about which you have testified?

A. What emulsion number?

Q. Yes.

91 A. I haven't testified concerning any emulsion number in connection with that particular type of film.

Q. Are you able to at this time?

A. No, I am not.

Q. Give us any emulsion number on the 116 Verichrome, give us any emulsion number on the 116 film.

A. Not without referring to the cartons.

Q. Would you do that, please?

A. Sir?

Q. You want 116—

A. 116 Verichrome film.

Q. 116 Verichrome film.

A. You want the emulsion number?

Q. Sir?

A. Is that what you are referring to? You want the emulsion number?

Q. Yes.

A. 7009-709-4.

Q. Say it a little more slowly.

A. 7009-709-4.

Q. Can you tell us how many cartons or cases—let us leave it by cartons—of the 116 Verichrome film were included in this shipment of July 8, 1950?

A. You want me to—

92 Q. Can you tell by looking at Government's Exhibit 67?

A. No, I can't.

Q. The waybill?

A. No, because the film is consolidated, so to speak, and all the types are together.

Q. Do you know or are you able to tell from any record that you may have in your possession, Mr. Witness, how many cartons of 116 Verichrome film were manufactured under the emulsion number 7009-709-4?

A. No.

Q. Will you refer to the records, please, Mr. Witness, and tell us how many cartons of 116 Verichrome film were included in this shipment?

I will withdraw that.

You have been referring to some memoranda and notes here. Will you tell the court and jury to what you refer?

A. In what connection, what particular?

Q. What notes are you referring to now in connection with this examination?

A. I am referring to notes made from our shipping records.

Q. None of those have been marked for identification in this case, have they?

93 A. No, not yet.

Q. Can you tell by an examination or inspection of Government's Exhibit 67 how many rolls of 8 millimeter Kodachrome film were included in the shipment of July 8?

A. I could tell you how many was shipped, but not from that.

Q. But not from Government's Exhibit 67?

A. No, because it is not itemized.

Q. In other words, this waybill gives us no information, does it, in detail of what this shipment consisted?

A. It doesn't give you in detail, no, sir.

Q. As I read it—and if I misread it, you correct me, because I am not familiar with these things—it indicates, does it not, that there were 598 boxes of film, is that right?

A. Yes.

Q. Without any designation of kind and character and nature or description of film?

A. That is correct.

Q. The other articles and things described in this bill of lading, were those shipped from the Eastman Kodak Company: One box of toilet preparation?

A. That is right.

Q. One box of paper labels?

94 A. Correct.

Q. One box of paper envelopes?

A. Correct.

Q. Two boxes of motion picture film developing outfit parts?

A. That is right. You understand that this is not an invoice. This is for freight.

Q. I understand, this is a bill of lading for the carrier, is that so?

A. Yes, so we are involved only in total weight. That is why it is not in detail.

Mr. Callaghan: I move that be stricken as a voluntary response of the witness.

The Court: Motion denied.

By Mr. Callaghan:

Q. 1727 Indiana Avenue is your wholesale point in Chicago, isn't it, Mr. Vayo?

A. That is correct.

Q. And that is the place from which distributors are supplied?

A. Our dealers are supplied.

Q. Your dealers and your distributors are supplied over there?

A. Our dealers. We have no distributors. We are
95 our own distributors.

Q. Well—

A. With the exception of motion picture film.

Q. Sir?

A. With the exception of professional motion picture film.

Q. It is the place to which the factory ships your merchandise before it gets into the outlet of the trade?

A. That is right.

Q. I wish you would advert to the cartons here that contain in the shipment magazine film. Will you please, Mr. Vayo—

A. What do you want me to do with it?

Q. Look at the cartons that you say contain the magazine film.

A. Yes.

Q. What numbers are those?

Do you know, Mr. Downing? Are they 17 to 63?

Mr. Downing: They are included within that group, yes. Some are roll and some are magazine type.

The Witness: These are all roll film.

Mr. Downing: These are roll film.

The Witness: These are rolls.

96 Mr. Downing: I don't think there are any magazine type in here.

The Witness: No, I don't think so.

By Mr. Callaghan:

Q. We do not have in court here any cartons containing or that theretofore had contained any magazine film, do we?

A. I don't see them.

Q. Mr. Witness, this emulsion No. 5268-176, that was all movie film, was it?

A. It was 16 millimeter movie film, yes, but used only as—

Q. Is this sometimes referred to as professional film rather than amateur?

A. That particular film is professional film. Professional film can come either in the 16 or 35 millimeter size.

Q. When merchandise such as this is shipped to 1727 Indiana Avenue, your plant at 1727 Indiana Avenue, is a charge made from Rochester against the plant at 1727 Indiana Avenue?

A. Yes, but not by—

Q. You have answered my question by saying yes.

A. Yes, a charge is made.

97 Q. And that charge is made for the entire shipment?

A. That is right.

Q. Will you tell us now what charge was made to the Indiana Avenue plant for the film that was involved in this shipment?

A. I can't in total, no. I haven't the—

Q. Do you have any figures there that would indicate?

A. I haven't in total.

Q. Who would have those figures?

A. Rochester would have them.

Q. Would your plant at Indiana Avenue have them?

A. That I can't tell you, whether they have them now or not.

Q. If they were in existence, the charge being made from Rochester to Chicago, who at 1727 Indiana Avenue plant would have those figures?

A. The manager of the plant.

Q. Who is that?

A. Well, I am not sure whether he would have them or not. Mr. Hill is the manager of the plant, but I am not sure whether he would have them at this time.

Q. Is that Hill, H-i-l-l?

A. That is right.

Q. May I see the book to which you adverted a little while ago when we were discussing prices of the films? You had a book that had some real coloring in it.

A. Yes.

Q. Will you turn to the page to which you adverted at the time you testified as to price?

A. They are all over. You will have to tell me the type of film, and I will show you the price.

Q. May I look at that just a moment so that I can know what I am talking about when I ask the questions?

May I have a moment to examine this, Judge?

The Court: You may.

The Witness: The films are all on the front of it.

By Mr. Callaghan:

Q. I just noted that.

Mr. Witness, on your direct examination you testified after examining the document which I hold in my hand called a condensed price list 1949 wholesale of Eastman Kodak Company, Rochester, New York. Did those same prices prevail in July of 1950?

A. They did.

Q. And how long after July of 1950?

A. I would say approximately six months.

Q. How long prior to July of 1950?

99 A. That I can't tell you definitely as to what time in the middle of 1949.

Q. Will you show me the page from which you gave your testimony on Mr. Downing's direct examination?

A. Well, you give me the film that you are concerned with and I will give you the price.

Q. Mr. Downing asked you about the price of 16 millimeter film.

A. What type of 16 millimeter film? There are many types.

Q. Do you remember what type he asked you about? I don't. He asked you about 16 millimeter Kodachrome, I believe.

Mr. Downing: Commercial Kodachrome.

The Witness: Commercial Kodachrome are you talking about?

By Mr. Callaghan:

Q. Yes.

A. It is not in here.

Mr. Walsh: I move to strike all this testimony about commercial Kodachrome 116 because the indictment only charges or mentions 11 cartons 116 Kodak film. It does not say anything about Kodachrome.

100 Mr. Downing: We are talking about 16 and not 116.

The Court: Motion is denied.

By Mr. Callaghan:

Q. You said 16 millimeter Kodachrome is not in that book?

A. Commercial Kodachrome?

Q. Yes.

A. No, it is not.

Q. From whom did you get the figure about which you testified about the commercial Kodachrome?

A. From the basis of our invoicing to J. A. Brulatour, which I have here.

Q. J. E. Brulatour was a co-consignee of this shipment, is that right? Is that the name of the co-consignee?

A. Yes.

Q. Some of this merchandise was going to Brulatour?

A. It was an enclosure.

Q. And some of it was going to 1727 Indiana Avenue?

A. That is right. The bulk of it was going to our own house, and there were some other, what we call, enclosures or drop off shipments to other people, small shipments, and one of them was Brulatour.

Q. Is Brulatour one of your agents?

101 A. He is sole distributor of motion picture film in the United States.

102 Q. Now, do you have any document or any price list of the Eastman Kodak Company with you now, telling us the cost or the price of that 16 millimeter commercial film?

A. Yes, I have the original records from which the charge was made.

There is one lot. (indicating); there is another lot, and those are the 100-foot rolls, and this is the 400-foot rolls. Here is the price per foot, and the extension, and the total value of the film. Of course, this side of them is eliminated because it concerns his commission.

Q. How much did Brulatour send for the commission?

A. What did what?

Q. What did Brulatour send to the Eastman Kodak Company in connection with these invoices; how much?

Mr. Downing: If your Honor please, I am going to object. It is not definite whether it is money, film, or whatever it might be.

The Court: Are you asking the price?

Mr. Callaghan: Yes, what did they send him in dollars.

The Court: Well, if he knows, he may answer.

By The Witness:

A. Well, presumably they sent him the amount that 103 was billed.

By Mr. Callaghan:

Q. Do you know, Mr. Witness?

A. Of course, I don't know. I don't get the money.

Q. And Brulatour gets a discount, does he not?

A. That is right.

Q. Of how much?

A. That varies again.

Q. That discount, in some instances, amounts to 40 per cent, doesn't it?

A. No, it does not.

Q. What is the highest it amounts to?

A. I don't know. I know it is not 40.

Q. You say it is not 40, and yet you don't know what it is. Is it 30?

A. No, I should think 8 per cent.

Q. Eight per cent would be the most Brulatour would get off?

A. I should think so.

Q. And Brulatour pays the bill, less 8 per cent. Do you undertake to develop the film, free?

A. No, we don't.

Q. No?

A. No.

104 Q. Does the charge that is made to the Brulatour company include an excise tax?

A. No.

Q. Does it include any service charge?

A. No, it does not.

Q. For handling?

A. No.

Q. Brulatour company, by the way, have offices in your plant at 1727 Indiana Avenue, don't they?

A. They don't at the present time; they did.

Q. They did in July of 1950?

A. That's right.

Q. That was the only part of this shipment that is set forth on Government's Exhibit 67 that went to the Brulatour company, was the commercial film?

A. That's right.

Q. Was any of that commercial film consigned to the Eastman Kodak Company?

A. No.

Q. How many cartons, Mr. Vayo, of this commercial Kodachrome film were consigned to Brulatour?

A. I think I testified that there were—I don't know unless I refer to my notes. You have got the shipping tickets right there. All I have to do is add them up.

105 Q. Can you tell by looking at these exhibits, Government's Exhibits 74, 75, 76 and 77, for identification?

A. There are one, two, three, four, five, six cases here.

Mr. Downing: Let the record show the witness is pointing to Government Exhibit 76.

By Mr. Callaghan:

Q. Now, do you use "cases" and "cartons" synonymously?

A. That's right, they are one and the same thing.

Q. Because in your direct examination you referred to a little box that had one film in, as a carton of film?

A. Well, that is a carton, but those are cartons or cases.

Q. Well, these are more properly described as cases, are they not? By "these," I mean all of these large cardboard items that we have here?

A. Well, it could be cases or cartons.

Q. And the little caddy which Mr. Walsh has before him here, that is probably a carton?

A. That is what we call the shelf carton.

Q. Now, may I look at Government Exhibit 76?

A. Yes.

Q. Is everything shown on Government Exhibit 76 106 the entire shipment of Kodachrome commercial film?

A. May I see those?

Mr. Callaghan: Sure.

The Witness: This does not include—

By Mr. Callaghan:

Q. By "this," you mean Government Exhibit 76?

A. Government Exhibit 76 does not include 64 100-foot rolls. It covers 300 rolls, 100-foot rolls of this particular type film.

Q. By "this particular type film," you refer to the Kodachrome commercial?

A. That's right.

Q. Now, was any Kodachrome commercial film consigned to the Eastman Kodak Company?

A. No.

Q. Will you show us the box, Mr. Witness, or the cases which contain the 116 Kodak film?

A. Right here (indicating).

Q. By "right here," you indicate—

A. This lot right here (indicating), I believe is of 116. Is that right?

Mr. Downing: Government Exhibits 6 to 16, inclusive.

By Mr. Callaghan:

107 Q. What is the difference between 116 Kodak film and 116 Verichrome film?

A. Well, it is a different type of film.

Q. Do you have any cartons here which contain the Verichrome film?

A. 116 is a Verichrome film.

Q. Well, did these cartons, these cases, Government Exhibits 6 to 16, inclusive, contain a Kodak film or Verichrome film?

A. Well, Verichrome film is Kodak film.

Q. Well, is all Verichrome film Kodak film?

A. Yes.

Q. Is all Kodak film Verichrome film?

A. No, not necessarily.

Q. Do you know what the emulsion number was that is on the outside of Government Exhibits 6 to 16, inclusive?

A. Only from reading on the carton.

Mr. Downing: This is repetitious. We have been over it once.

The Witness: That is there.

Mr. Callaghan: I submit he has not been over it before. This is entirely different. I asked him about something else before.

By Mr. Callaghan:

108 Q. The emulsion number then which is involved on this Verichrome film is 6009-512-7, is that so?

A. Well, that is what you are reading; I don't know.

Q. You see if I read it.

A. 6009-512-7.

Q. Is there an "H" after that, or something?

A. It is a blob. Let's take a look at another one.

Q. Now, this has a different number on it, does it, Mr. Witness? By "this," I mean Government Exhibit 6.

A. 7009.

Q. It is different by a thousand?

A. Different by a thousand.

Q. Is this 6009 and this 7009 the same emulsion?

A. It is quite possible. It could be a different batch or a different roll from which it is cut.

Q. Do you have a record there now which indicates how many rolls of Kodachrome was made in emulsion 6009-512-7?

A. No.

Q. Maybe thousands of film were made from that emulsion?

A. Probably yes.

Q. And many, many hundred cases were made from that same emulsion number?

A. Likely.

109 Q. And likely it is many, many hundred cases of that emulsion was shipped from the plant in the month of July, out of your plant at Rochester, New York?

A. It is possible.

Q. To all various parts of the United States?

A. It is possible.

Q. And if I were to ask you the same questions with reference to emulsion 7009-4, would your answers be the same as to that emulsion number?

A. I think so.

Mr. Callaghan: Here is one I cannot read. If you will look at it, Mr. Downing, we will interpret it together. It looks like 7009-837-39.

The Witness: There may be a number on the reverse side.

Mr. Downing: Well, be guided by Mr. Vayo.

The Witness: 700—907—35.

By Mr. Callaghan:

Q. That is also another emulsion number?

A. Yes.

Q. If I were to ask you the same questions with reference to the number of cases or the film made in that emulsion, your answer would be the same as given to me 110 when I asked you about 6009-512-7?

A. Yes.

Q. Well, to save time, if it appears that various emulsions appear on the outside of these cases that have been identified here as government exhibits—do you understand me now?

A. Yes.

Q. That different numbers appear on the various of these cases, would your answer be the same were I to ask you the same question concerning each case?

A. With the exception of commercial Kodachrome.

Q. With the exception of the commercial Kodachrome?

A. That's right.

Q. Wherever the other cases may vary or differ in number, your testimony would be, as to each, that there may be hundreds of cases of those films made under that emulsion number shipped out to all parts of the U. S. during this period involved in this testimony?

A. With the exception of commercial Kodachrome.

Q. Now, will you look at the book to which you referred in connection with the values you have testified to here, Mr. Vayo? Will you refer to it again, please?

A. What is the question?

Q. Sir?

111 A. What is the question?

Q. Well, you get the book out, first, and I will get the question ready.

Will you look at the page that has to do with the value of the 116 Verichrome film?

A. Here it is.

Q. Sir?

A. Here it is.

Q. Now, the price you have given us on your direct examination, Mr. Witness, was your list price, wasn't it?

A. The retail price.

Q. The price at which the Bass Camera Company or the Walgreen Drug Store sells that merchandise?

A. That's right.

Q. Now, there are some figures in red opposite the No. 116 film?

A. Yes.

Q. Verichrome film?

A. That's right.

Q. And that figure or figures are awfully fine. The first column is headed "Basic net"?

A. That is the net wholesale price.

112 By Mr. Callaghan:

Q. What was that price?

A. That is the price that it was sold to the dealer.

Q. And what is that?

A. For this particular film?

Q. Yes.

A. \$30, I believe, or \$30 for 100 rolls.

Q. \$30 for 100 rolls?

A. Yes.

Q. For a case of 100 rolls?

A. For a case of 100 rolls, yes, sir.

Q. Now, what is the figure around which you have a circle in the right-hand column?

A. That is the list price or the retail price per roll. 49 cents per roll.

Q. Or it would be \$49 for 100 rolls, or a case?

A. Yes.

Q. What was the basic net figure that you gave me before?

A. \$36.

Q. A difference of \$19 a case, is that so?

A. Yes.

Q. You gave us a figure of 147 in connection with the 116 film, didn't you?

113 A. I think that was the figure.

Q. Upon what did you base that figure of \$147?

A. Well, it was based on the retail value.

Q. For how many rolls?

A. For 100 rolls.

Q. For a hundred rolls?

A. Yes.

Q. Well, maybe it is my inability to comprehend. I just understood you to say that 100 rolls would cost the retailer \$49, but that the net price was \$30. Do we understand each other?

A. \$30 per 100 rolls.

Q. \$49 is the retail price?

A. You are going back to the testimony that I gave as to the value. I will have to refer back to my notes as to the value.

Q. Well, let's talk about the value from this document for just a moment. We are concerned with 116 Verichrome film, and your testimony now is that the net price of that film is \$30 per case of 100 rolls?

A. Per case of 100 rolls, at \$30.

Q. Now, where did you get the figure of \$147 in connection with the 116 Verichrome film that you gave on direct examination?

114 A. Well, I will have to refer to my notes, if I may, so that I can tell you. Perhaps I have made an error.

The Court: Refer to your notes.

The Witness: What?

The Court: You may refer to your notes.

Mr. Callaghan: Does Your Honor want to suspend for the noon recess while he looks at his notes? It is 12:20.

The Court: No. We will go to 12:30.

The Witness: Well, as a matter of fact, there were 300. That was figured on the basis of 300 rolls per case. That makes quite a difference.

By Mr. Callaghan:

Q. Well, are there 300 rolls to the case?

A. There can be.

Q. Were there 300 rolls in one of the cases?

A. There were 300 rolls per case involved in the shipment. Those were 300 roll cases.

Q. That is, in each one of these cartons? Strike that. Each one of these cartons that has been marked as Government Exhibits 6 to 16, inclusive, those are 300 rolls to the case?

A. That is right. That is marked right there.

Q. So, that for 300 rolls, you will triple your figure
115 that you gave me in your answer on cross examination,
so that your net price was \$90; three times 30, is that
right?

A. That is right.

Q. And the price to the dealer would be three times 49
or \$147? That is how we get \$147?

A. That is right.

Q. Now, included in that price that you gave of \$49 to
the dealer, there is included an excise tax, is there?

A. Yes, it includes a tax.

Q. How much of an excise tax is included in that price
of \$49, which you said was part of the value here?

A. I am not positive; I can't state.

Q. Do you know percentagewise?

A. I imagine it is around 10 per cent.

Mr. Callaghan: I move that that be stricken. It is
based on his imagination. I am not asking for his imagina-
tion.

The Court: The answer may stand for what it is worth.
Obviously, that is the best that he can give you.

Mr. Callaghan: Well, I move to strike it out.

The Court: Your motion is denied.

Mr. Callaghan: He is basing it on his imagina-
116 tion.

The Court: Proceed.

By Mr. Callaghan:

Q. Now, where in that book will you find the magazine
film to which you referred?

A. What type of magazine?

Q. You testified that there were magazine film, 50 maga-
zines to the case.

Mr. Downing: The question I asked was predicated up-
on the type. I submit that if Mr. Callaghan—

Mr. Callaghan: He testified as to the magazine film;
there were 50 magazines to the case, which was worth
\$252.50.

Mr. Downing: The question was predicated on 8 milli-
meter.

The Court: 8 millimeter. Very well.

The Witness: 8 millimeter?

25 foot magazine, is that what we are talking about?

Mr. Downing: That is right.

The Witness: What do you want, the price?

By Mr. Callaghan:

Q. I want to know from where you testified—first,
117 you testified from page 4 of this book that you hold
in your hand, is that so?

A. That is right.

Q. Will you show me from which column you testified?

A. Here is the list price.

Q. The list price is what?

A. \$5.05 a roll or magazine, I believe.

Q. \$5.05 a roll?

A. Yes.

Q. What is the other price?

Mr. Downing: If your Honor please, I submit that counsel is leaning right over the witness. The gentlemen is perfectly capable of hearing.

Mr. Callaghan: Now, counsel, I am trying to get along. I am trying a lawsuit.

The Court: If he annoys you, say so, Mr. Witness.

The Witness: He is not annoying me. After all—

Mr. Downing: It certainly is not helpful.

The Witness: It is not helpful.

The Court: Go ahead.

Mr. Callaghan: Well, you are not trying to be helpful, in the first place.

118 Mr. Downing: I object to that and ask it be stricken out.

The Court: Strike it out.

Mr. Callaghan: That was responding to a voluntary statement by counsel that I was not helpful.

By Mr. Callaghan:

Q. Will you tell us the price, that price in the first column? Is that the basic net price of that film?

A. \$3.29.

Q. As compared with the figure on the extreme right, which is what?

A. \$5.05.

Q. Now, is there an interim figure there between those two figures, is there a figure?

A. No.

Q. Now, was all that magazine film consigned to the Eastman Company or was it consigned to Brulatour?

A. No. It all went to the Eastman Kodak Company.

Q. How many cartons were consigned to the Eastman Kodak Company?

A. I have to refer to my records again.

Mr. Walsh: Let us see what he does refer to.

The Witness: There were 4,000.

119 By Mr. Callaghan:

Q. Sir?

A. Eighty cases.

Q. Four thousand?

A. Four thousand magazines, which means that there were 80 cases, or 50 there to the case.

Q. There were 80 cases in this one shipment?

A. Yes, 80 cases were shipped.

Q. Will you tell me the cartons that will make up these 80 cases, please?

A. No, I can't show you the cartons.

Q. Are they here in court?

A. I don't know. I would not say that they are. From what I can see, not all of them.

Q. Will you step down and find any of them?

A. We were looking, and we could not find them.

Q. Well, there are not any?

A. There is nothing here that I can find.

Mr. Callaghan: This has gotten to be an obstacle race, Judge, to get up there to the witness.

The Court: Move them over.

By Mr. Callaghan:

Q. Are these films, Mr. Vayo, a fair trade item?

120 A. I don't know.

Q. You don't know the price at which those films are sold in Chicago, do you?

A. No, I don't.

Q. That is true of all these films about which you have testified?

A. Oh, generally. After all, I know that the films—

Q. Aren't you familiar with Chicago market as to how such films are sold in Stineway or Walgreen's drug stores?

A. No, but I am familiar with what the prices are to the Eastman Company stores in Chicago.

Q. You are familiar with what the books show, is that right?

A. Well, that is quite a lot.

Q. As to whether it is quite a lot or quite a little, is that your answer?

A. Yes.

Q. What is shown in that 1949 price list?

A. That is right.

Mr. Callaghan: That is all.

The Court: You will take up your cross examination at 2 o'clock this afternoon.

We will recess until 2 o'clock.

121 (The trial in the above-entitled cause was recessed until 2 o'clock p.m. of the same day, namely Tuesday, May 29, 1951.)

122

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 50 CR 641) * *

Before Judge Campbell
and a jury.

Tuesday, May 29, 1951,
2 o'clock p. m.

Trial resumed pursuant to recess.

Present:

Mr. Robert J. Downing,
for the Government;

Mr. George F. Callaghan,
for defendant Gordon;

Mr. Maurice J. Walsh,
for defendant MacLeod.

CHARLES H. VAYO, resumed the stand and testified further as follows:

(Whereupon, the following proceedings were had in the presence and hearing of the jury:)

Mr. Walsh: Incidentally, there are no witnesses in the courtroom, are there?

Mr. Downing: Not to my knowledge, I cannot see behind there, but from what I see—except Mr. Mehegan.

Mr. Walsh: Yes.
123 The Court: All right. You may commence the cross examination on behalf of the defendant MacLeod.

Cross Examination

By Mr. Walsh:

Q. Mr. Vayo, is this company, this plant here in Illinois, this Eastman Company here in Illinois, is that the same corporation that is in Rochester, New York?

A. Yes.

Q. What is the name of that corporation?

A. Eastman Kodak Company.

Q. Eastman Kodak Company, and that company is, I suppose, qualified to do business in Illinois by the Secretary of State?

A. Yes, that is right.

Q. And Mr. Hill is the manager?

A. Manager of the Chicago branch.

Q. Your position is that of traffic manager?

A. I am the general traffic manager, not the traffic manager. We have traffic managers all over our—

Q. For each different plant?

A. Yes.

Q. But you are for the entire organization?

A. Yes.

Q. Plus all of the subsidiaries?

124 A. That is right.

Q. Are there any subsidiaries here in Chicago?

A. Yes, the Taprell Loomis.

Q. Taprell Loomis?

A. Taprell Loomis.

Q. Do they deal in this film about which you have been talking?

A. Nothing to do with film.

Q. Are there any subsidiaries in Chicago that deal with this film about which you have been talking?

A. No, sir.

Q. As general traffic manager in charge of all the traffic for the company throughout the world—is that right?

A. That is right.

Q. Do you have personal knowledge of the records as they are made day by day?

A. Many of them.

Q. Well, concerning this particular shipment that was made July 8th and about which you have testified, on July 8th were you aware of the entries that were being made concerning that shipment?

A. Only in a general way.

Q. Did you know that there was such a shipment on 125 July 8th?

A. I probably knew at the time that there were shipments for Chicago.

Q. That there was a shipment for Chicago?

A. Yes.

Q. Did you know then what the shipment amounted to, what it consisted of?

A. No, sir, not specifically.

Q. In other words, you may have had a record in your office or accessible to you which would disclose that information, is that right?

A. That is right.

Q. But personally you wouldn't know without consulting your records?

A. Of course, the engaging of the transportation would come directly to me. For instance, I would know how many vehicles would be necessary to handle this particular shipment on that particular day.

Q. Is there a traffic manager in your plant in Rochester?

A. Yes, we have several of them.

Q. And do you negotiate the employment of each truck?

A. In this particular instance, I do.

Q. What do you mean, in this particular instance you do?

126 A. In this particular haul from Rochester to Chicago is something that I personally attend to myself.

Q. Well, then, you were personally aware that there was a shipment for Chicago?

A. There was a shipment. We make shipments every day to Chicago, so I would have that knowledge.

Q. What I am trying to find out is whether you had knowledge of this specific shipment or whether you were just drawing a conclusion because there was a shipment every day to Chicago that you knew about this one, too.

A. Well, as I say, I—

Q. Prior to—on July 8th, prior to July 10th, was there anything about this shipment that was unusual?

A. No.



Q. And that made it different from any other shipment?

A. No.

Q. That went out to Chicago. I want to ask you about this film, 116 Kodak film. Is that the same as 116 Verichrome Kodak film?

A. 116 Kodak Verichrome is the proper title.

Q. Is there a 116 Kodak film that is not Verichrome?

A. There could be. I couldn't tell you definitely without referring—I don't believe so; but without referring to those records—those things change from time to time.

127 Q. Well, "Verichrome" means "colored", does it not?

A. That's right.

Q. And you don't believe, then, that they make a black and white 116?

A. They do make black and white, but I say whether or not they have black and white at this particular time, I couldn't tell you, without referring to my records.

Q. Whether they had a black and white at this particular time—you mean July 8th?

A. I mean July 8th.

Q. You mean whether there was any in stock?

A. That's right.

Q. But it is a current item from day to day, day in and day out?

A. Oh, yes, but we run out of film, too.

Q. Well, would you say, then, that your company was out of 116 Kodak film?

A. No, I wouldn't.

Q. Now, without consulting any of these records, do you know whether this shipment contained 116 Kodak film?

A. It contained 116 Verichrome film.

Q. And, without resort to the records, now, at all, do you know whether or not it contained 116 Kodak film?

A. As far as my knowledge, no, it did not contain 128 any Kodak 116.

Q. Now, with regard to the price, the prices about which you have testified, you testified to values, as I understand it?

A. That's right.

Q. Retail values?

A. Yes.

Q. Are you aware of all of the price lists that your company puts down?

A. Yes.

Q. May I see that book that you consulted this morning? Would you show me the page to which you referred?

A. What item are you talking about?

Q. Are they on different pages?

A. Yes.

Q. Well, 116 Kodak film.

A. Kodak Verichrome?

Q. No, "Kodak" is what the indictment says.

A. Well, there is Kodak roll film (indicating).

Q. Well, now, that is the item that you went over with Mr. Callaghan, isn't it? I am not trying to confuse you. That is the \$30 and \$49 retail?

A. That's right.

Mr. Callaghan: That is the Verichrome.

128½ The Witness: It is all Verichrome or Superdex.

Mr. Callaghan: Pardon me, I wasn't addressing my remark to you. I was addressing my associate. I am sorry. By Mr. Walsh:

Q. This is Verichrome. Are they all the same price, black and white, and colored?

A. Not necessarily.

Q. Well, actually?

A. Well, you have the list there; you can tell.

Q. Well, this is a little bit complicated.

A. There is your price of your Verichrome here, and here is Super XX, and here is Kodacolor, and here is Infrared.

Q. What is plain black and white?

A. Right here. That isn't plain black and white. That is Super XX, which is a black and white film. That is the item right here (indicating). Plus X film is another type. That is right there (indicating). They are different type of emulsions. Here is a colored film (indicating).

Q. Well, now, let's take the Kodachrome magazine film, 8 millimeter Kodachrome magazine?

A. \$5.05, right here, 25-foot magazine, daylight type.

129 Mr. Callaghan: We cannot hear you back here. Speak up.

By Mr. Walsh:

Q. Now, is that film colored?

A. No, I think not. No, that is black and white.

Q. Now, is colored film more expensive than this?

A. Generally speaking, yes.

Q. Well, on this particular item, Kodachrome magazine 8 millimeter, that would be more expensive than a Kodachrome.

A. I beg your pardon. This is Kodachrome; therefore it is color.

Q. Now, there are three figures behind. The entire line reads, does it not, "No. 337, 25 foot magazine, daylight type"?

A. Yes.

Q. "Net without tax, \$3.29", is that right?

A. Right.

Q. "Excise tax, 32 cents"?

A. Yes.

Q. "List, including tax, \$5.05"?

A. Yes.

Q. Now, as a matter of fact, that tax is on the retailer when he makes the sale, is that right?

130 A. That is right.

Q. Your company doesn't pay the tax?

A. No, not that tax.

Q. And is that \$3.29 your price to the retailer?

A. No, it is the price to the dealer who sells it at retail.

Q. Well, he is a retailer?

A. Well, if you want to call him that. We don't call him that.

Q. Well, so we will understand each other as we talk about the other items, a man who sells to me, a user, is a retailer, is he not?

A. That's right.

Q. Now, as a matter of fact, that film, when sold, provides that it shall be developed as part of your deal, doesn't it?

A. Some types of film include processing.

Q. Well, that Kodachrome magazine film, if I take my 8 millimeter Kodak movie camera and buy a cartridge to put in it, I mail it back to your company, and you return it to me fully developed, don't you?

A. That's right.

Q. The roll, on a spool?

A. That's right.

131 Q. And that is included in that price, is it not?

A. That's right.

Q. That is included in the price that you testified about on direct examination?

A. Correct.

Q. The \$5.05. And as far as that is included, it is included in the price of \$3.29, as you sent it out?

A. Indirectly, I suppose it would be.

Q. Do you make any charge to your dealer for the development of it?

A. No.

Q. You have calculated that charge in your \$3.29, have you not?

A. I wouldn't know whether that is included in that figure, or not.

Q. Do you have anything to do with making prices of film, determining it?

A. No.

Q. Other than perhaps to show the cost of your department for—

A. No, that wouldn't enter into it at all. The only interest I have is in loading trucks and freight cars as to value, and limiting our value of all of our truckloads, and all of our train loads.

132 Q. Incidentally, this 25-foot magazine daylight type Kodachrome magazine film is on page 4 of this book entitled "Condensed price list, Eastman Kodak Company", is it not?

A. That is page 4, that is right.

Q. What page was the first item you showed me on?

A. The 116?

Q. The 116.

A. The 116 is on page 5.

Mr. Callaghan: Mr. Walsh, may I make a suggestion? May I suggest that we have the document, the entire book, marked as Defendants' Exhibit 1 for identification and we will keep it here—

Mr. Downing: Just a minute, your Honor, as to whether or not they will keep it here. There is a lot of material which is not relevant to this lawsuit in that book.

The Court: I have no objection to it being marked.

(Said document was marked Defendants' Exhibit 1 for identification.)

The Witness: Your Honor, can't we take the sheets involved out of the book, rather than the whole catalog?

133 The Court: Let it be marked at this time, and then maybe we can do that.

By Mr. Walsh:

Q. Show me the 6 millimeter Kodachrome roll film, and mention what page you find it on.

A. What footage are you talking about?

Q. Well, the indictment here says, "Cartons 8 millimeter Kodachrome film," that is all.

Mr. Downing: Your Honor, this man doesn't necessarily have any knowledge of what this indictment showed.

Mr. Walsh: I am trying to describe it for him in the language it was described to us.

The Court: Very well. I think he understands.

The Witness: The price?

Mr. Walsh: Yes, sir.

By The Witness:

A. \$4.10.

By Mr. Walsh:

Q. Does the price vary on the footage?

A. Yes. This is 25-foot roll we are talking about, which is \$4.10.

Q. Now, your page 4 of Defendants' Exhibit No. 1, which is this condensed price list, reads, "Kodachrome 134 No. 369, 25-foot roll, daylight type, net without tax, \$2.70, excise tax 23 cents, list, including tax, \$4.10," does it not?

A. That is right.

Q. Now, can you show me the price in this book of 16 millimeter Kodachrome movie film?

Mr. Downing: If your Honor please, I am going to object. Mr. Callaghan examined him in so far as this type of film is concerned, as well as one of the other three types we previously discussed, and Mr. Callaghan went into that thoroughly.

The Court: Don't duplicate what Mr. Callaghan has asked. Didn't he get these prices on the 16 millimeter?

Mr. Downing: Yes, he did.

Mr. Walsh: Your Honor, I listened to the testimony very carefully, and I am not clear—

The Court: My question is not whether you are clear, but whether or not it is in evidence.

Mr. Walsh: But it may be in evidence, but I am a representative of Mr. MacLeod, and I believe we have a right to confront the witness—

The Court: Yes, but I am not going to have unnecessary repetition. There are four classes.

Mr. Walsh: And this is the fourth class.

135 The Court:—Try not to duplicate Mr. Callaghan's examination, because you are protracting the trial.

By Mr. Walsh:

Q. Have you found the 16 millimeter Kodachrome movie film?

A. Are you talking about commercial?

Q. I am talking about 16 millimeter Kodachrome movie film.

A. You are not telling me what length, so that I can identify it.

Q. Now, look in the third count of the indictment—

Mr. Downing: I submit that if counsel wants to ask him a question, he should ask it.

The Court: He has asked the question. If you are unable to find it from that description, say so.

The Witness: I cannot, from that description.

The Court: Very well. Proceed with something else.

By Mr. Walsh:

Q. Now, I show you a document which has been marked as Government's Exhibit 76 and Government's Exhibit 67, respectively, and I ask you if you can tell me from consulting those two records any more about this 16 millimeter Kodachrome movie film? Can you determine 136 any more particularly by consulting those two records?

A. This record here is a record of Kodachrome commercial millimeter film. That is what you are inquiring about.

The Court: What document are you referring to, Mr. Witness?

The Witness: 76.

The Court: Very well.

By Mr. Walsh:

Q. Now, is Kodachrome commercial mentioned in Government's Exhibit 1 for identification?

A. In there?

Q. Yes, sir.

A. No, it is not. It is not a published price.

The Court: That is not Government's Exhibit 1.

Mr. Walsh: I meant Defendants' Exhibit 1 for identification.

The Court: You said "Government's".

Mr. Walsh: I mentioned Defendants' Exhibit 1.

The Court: All right. It is not in there. Go ahead.
By Mr. Walsh:

Q. Now, where did you obtain this document, Defendants' Exhibit 1 for identification?

A. Well, from my office.

136½ Q. Sir?

A. At my office.

Q. And from whom?

A. The Sales Department keeps me informed as to the prices.

Q. And it is an official record of the Eastman Kodak Company, a publication?

A. That is right.

Q. And it is one on which you rely in transacting the company's business, is that right?

A. Yes, sir, that's right.

Q. Now, did you bring Exhibit No. 67 with you, Government's Exhibit 67?

A. No, I did not.

Q. When did you first see that?

A. Oh, many months ago.

Q. Well, this week?

A. Well, I have a copy of this.

Q. Well, where did you first see that one this week?

A. Yesterday.

Q. In this building?

A. Yes.

Q. It was in the possession of the United States Attorney, or the FBI, I assume, is that right?

137 A. That's right, I don't know which.

Q. You have seen it previously, though?

A. Yes, I have a copy of it.

Q. Now, Government's Exhibit 76, did you bring that?

A. I have a copy of that.

Q. Do you know whose handwriting that is made in?

A. No, I don't. I cannot tell from this particular document.

Q. Is it a record that was made under your supervision?

A. That's right.

Q. Well, isn't there any way of determining who made it?

A. Not from there (indicating).

Q. Could you tell where it was made?

A. It was made in Rochester.

Q. How did you determine that?

A. Well, it is our original packing record, this here (indicating), right on top.

Q. It says "Packing record".

A. And it is packed in Rochester.

Q. In your presence?

A. No.

Q. Now with regard to this commercial film, that is, you testified about some commercial film, I believe, and you stated that that was a special emulsion, is that 138 right, or a special order?

A. A special batch of this particular type of film.

Q. Well, let's go into that. Was that emulsion especially prepared for this particular shipment?

Mr. Downing: Objection, your Honor. This emulsion number or proposition has been thoroughly covered. I submit that anything more on it is repetitious.

The Court: Sustained. This is repetition.

Mr. Walsh: If your Honor please, I would like to state that I am not clear on what happened to the film that came from that emulsion.

The Court: I think that has been gone into thoroughly enough, and I have sustained the objection. You may proceed to something else.

By Mr. Walsh:

Q. With regard to the film, you say it was returned from New York.

Mr. Downing: This is part of the same thing.

The Court: If both of you talk at once, I cannot hear either one of you. Let him finish, and I will hear you.

Mr. Downing: I apologize.

By Mr. Walsh:

139 Q. With regard to the film you talked about that was returned to New York, you told us something about that in direct examination.

Mr. Downing: Well, this is—

The Court: He has not finished his question.

By Mr. Walsh:

Q. (Continuing) Was that film part of this special emulsion?

A. Yes.

Mr. Downing: Your Honor, I object to any further examination on that because it is indirectly getting into the emulsion proposition.

The Court: Well, this question was not asked. The answer may stand.

By Mr. Walsh:

Q. Now, there was some that went to New York City, is that right? I assume when you say "New York", you mean New York City?

A. Well, New Jersey. We speak of it as New York.

Q. New York market?

A. Yes.

Q. Was that to the Eastman Kodak Company?

A. No, to J. E. Brulatour.

Q. And how many other persons received film from 140 the Eastman Kodak Company at Rochester that was made in that particular emulsion?

A. The only two are J. E. Brulatour in New York, and J. E. Brulatour in Chicago.

Q. How about the Eastman Kodak Company here?

A. No.

Q. There wasn't any consigned to the Eastman Kodak Company here?

A. It was consigned to Eastman Kodak as an enclosure with their shipment; it was for J. E. Brulatour.

Q. Then there were just two items that came from that particular emulsion?

A. Two shipments.

Q. Two shipments, rather?

A. That's right.

Q. Now, with regard to this film that went to New Jersey, how much of it went to New Jersey?

Mr. Downing: If your Honor please, I think that has been gone into.

The Court: No, he may answer that, if he knows.

By The Witness:

A. Yes, certainly.

By Mr. Walsh:

Q. Do you know without consulting your record, or 141 if you do know, is it a result of having consulted that record this morning—

By The Court: Oh, let him look at the record and answer. Obviously he doesn't know without consulting the record. If he said he did know, I would doubt his veracity.

Look at the record and answer.

Mr. Walsh: If your Honor please, I think the record ought to show if he is talking about something he knows about.

The Court: The record will show he is looking at his records and answering the question, which is the only way he could do it.

The Witness: Your question was, "How many rolls were shipped to New York"?

Mr. Walsh: To New Jersey.

By The Witness:

A. 111.

By Mr. Walsh:

Q. And they were addressed to J. E. Brulatour?

A. They were shipped directly to Brulatour.

Q. What is the record you used to refresh your recollection?

A. The actual shipping tickets.

142 Q. No, the actual one you just looked at.

A. Well, this is simply a survey which I—

Mr. Walsh: May I see it, your Honor?

The Court: Surely. This is the typewritten summary that you prepared.

The Witness: I prepared it myself from the shipping records, with some kind of form that was intelligible.

By Mr. Walsh:

Q. Sir?

A. I simply put it into some kind of form that was intelligible.

Q. For the purpose of testifying?

A. Yes, sir.

Q. Did you take it from the records of the company?

A. Yes, sir.

Q. Personally?

A. No, I did it myself.

Q. Now, the 111 that went to New Jersey, I am not sure that you completed your answer; at least, I gather the inference that you secure the return of all of that film, is that right?

A. 111 rolls were immediately returned to Rochester because of some defect in the emulsion.

143 Q. Was that at your request?

A. No.

Q. When was it returned to New York?

A. I cannot tell you at the moment. Some time around—

Q. Do you have any record of it?

A. Not here.

Q. How do you know it occurred, then?

A. Because we have records showing that.

Q. That record isn't here in Chicago?

A. I haven't the record here, no.

Q. You haven't produced it here?

A. No.

144 Q. And all of that film was returned. How was that defect in the emulsion discovered?

Mr. Downing: I object, as to how the defect was discovered. It is immaterial.

The Court: Do you mean in the New York shipment?

Mr. Walsh: Yes. If it was defective with regard to this shipment, it was defective—

Mr. Downing: As to whether or not it was defective in this or any other shipment I think is immaterial here.

The Court: It may go to the value.

Mr. Downing: Well, Your Honor—

Mr. Walsh: Yes.

Mr. Downing: I don't know whether it has anything to do with value or otherwise.

The Court: I will let him answer. Overruled.

By Mr. Walsh:

Q. Do you know how it was discovered and what the situation was on it?

A. Probably through the tests made on the shipment, the result of the tests made before the film was shipped, it was probably determined when the film had been released and after they were discovered it was recalled.

145 Q. It was shipped and the defect was discovered and then it was recalled?

A. That is right.

Q. If that emulsion was defective then any film that came from that emulsion was defective, is that right?

A. It is possible. I couldn't tell you definitely.

Q. If the film that went to New Jersey was defective because of the emulsion in which it was prepared, and some film from this same emulsion came to Chicago, both films would be defective for the same reason?

A. Not necessarily. The particular film that went, for example—if you would like me to explain, if the particular film that went to New York had been subjected to some extreme heat that particular lot of film might be defective, whereas the film that came on to Chicago would not be.

Q. Now, let me understand this. Are you shifting your position now or—

Mr. Downing: Just a minute.

By Mr. Walsh:

Q. Or changing it?

Mr. Downing: I resent—I think that should be stricken.

The Court: It may be stricken. Ask a question.

146 By Mr. Walsh:

Q. Are you now telling us, as I understand it, that the film that went to New Jersey was defective because it was subjected to some heat on the way to New Jersey?

A. No, I am not.

Mr. Downing: I think, Your Honor, the answer stands; whatever it is worth, and I think this other question here is irrelevant and improper.

The Court: Are you making an objection to this question?

Mr. Downing: Yes, I am.

The Court: The objection is sustained.

By Mr. Walsh:

Q. Was that film defective because of heat?

Mr. Downing: Objection.

By Mr. Walsh:

Q. Or because of the emulsion?

Mr. Downing: The question has been covered.

The Court: If he knows he may answer it. Do you know?

The Witness: No, I do not.

The Court: Very well. Proceed to something else.

By Mr. Walsh:

147 Q. Do you know what happened to this film when it was returned to the Eastman Kodak Company at Rochester?

A. No.

Q. Was it reprocessed, to your knowledge?

A. I don't know.

Q. Was it received by your department?

A. Yes, sir.

Q. And what did your department do with it?

A. Sent it back to the manufacturing department.

Q. And you have no note or record of what happened to it thereafter?

A. That is right, our concern—

Q. And no knowledge. Then you have no record with you of the receipt of that film and its return?

A. No, I haven't.

Q. You didn't bring that?

A. No.

Q. Were you asked to?

A. No.

Q. Or subpoenaed? What is the difference between this commercial film and an ordinary film, the other three types that you have testified about?

A. I am not in a position to tell you the different characteristics of it. I don't know, except that one is used in professional film and one in the amateur film.

Q. Is it generally more expensive or less expensive than the amateur?

A. They are not comparable in that direction at all.

Q. These four types of film which are listed here in the indictment, 116 Kodak, 8 millimeter Kodachrome roll, 8 millimeter Kodachrome magazine and 16 millimeter Kodachrome movie, of those four which does your company process free as part of its sales contract.

Mr. Downing: If Your Honor please, I think it is all covered in the question of pricing.

Mr. Walsh: Only one—

The Court: He stated one of them was, and he may state whether the other three are or not.

By The Witness:

A. The 8 millimeter Kodachrome roll film, the 8 millimeter Kodachrome magazine film, and the 16 millimeter Kodachrome movie film as listed here are all—processing is included. The 116, the first item, there is no processing involved.

By Mr. Walsh:

Q. And do you have any records with you concerning the cost of that processing?

A. No, I haven't.

149 Q. Do you know whether or not your company, on the return of the film on which it was processed, allows anything for that processing?

A. No, I do not.

Q. Are you acquainted with any sale at any price made in Chicago during the month of July, 1950?

Mr. Downing: I presume the question refers to Kodak film.

Mr. Walsh: Eastman Kodak film, yes.

The Court: You may answer.

The Witness: What is the question again?

By Mr. Walsh:

Q. Are you familiar with the price at which any Kodak film was sold in any particular transaction in Chicago during the month of July?

A. No.

Q. I will call your attention to a document, which I would like to have marked Defendants' Exhibit 2 for identification, and ask you to examine this document and tell me, it purports to be a price list for the Eastman Kodak Company—

(Said document was marked Defendants' Exhibit 2 for identification.)

150 Mr. Downing: If Your Honor please, I think he ought to find out whether he has seen it before.

Mr. Walsh: I am asking him whether it purports to be, that is all.

Mr. Downing: Still we ought to determine whether this man has knowledge of it.

The Court: I think that is a necessary fundamental question.

By Mr. Walsh:

Q. Have you ever seen that document before?

A. No, I haven't.

Q. Have you ever seen one similar to it before?

Mr. Downing: If Your Honor please, similar to it—

By Mr. Walsh:

Q. Or identical with it?

A. No.

Q. Are you familiar with that price list?

A. No.

Q. That is put out by your company?

A. No, I am not.

Q. Prior to my showing it to you, were you aware that such a price list was put out by your company?

A. No. We get out many prices lists. That may
151 be one of a hundred.

Q. I will show you a document identified as Defendants' Exhibit 3 for identification, which is a letter, and ask you if that aids you in any way in identifying this Defendants' Exhibit 2 for identification as a price list of your company?

(Said exhibit was marked Defendants' Exhibit 3 for identification.)

Mr. Downing: I think we ought to determine whether this witness has even seen that exhibit before.

The Court: Yes. You may ask him that, first.

By Mr. Walsh:

Q. Have you ever seen Defendants' Exhibit 3 before?

A. No.

Q. Are you familiar with any circular letter of your company numbered A5-324?

A. No. This is a letter put out by the sales department. I have nothing to do with the sales department.

Q. Defendants' Exhibit 1, this condensed price list which you brought with you, is put out by the sales department, is it not?

A. Indirectly. It is put out by a committee which 152 is made up of sales people as well as other people.

Mr. Walsh: May I have a minute, your Honor?

The Court: You may.

By Mr. Walsh:

Q. Would you take Defendants' Exhibit 1, please, and show me again in that document where No. 369, 25-foot roll of Kodachrome 8 millimeter safety film appears?

Mr. Downing: I object, starting on that all over again.

The Court: Sustained.

Mr. Walsh: I am not starting all over on this document.

The Court: I sustained the objection.

Mr. Walsh: I simply want to compare—

Mr. Downings: Objection.

Mr. Walsh: —that with the price—

The Court: He has never seen it. The objection is over-ruled.

Mr. Walsh: I think we have a right, Your Honor—I urge Your Honor—

The Court: Finish your cross examination.

Mr. Walsh: —to cross examine on another price extended in Chicago, and whether he knows about it.

153 The Court: Not this witness, when he is not familiar with it.

By Mr. Walsh:

Q. Isn't it a fact that 25 foot roll 8 millimeter film roll was offered to the retail trade in Chicago in July of 1950 at \$3.75 a roll?

A. I am not familiar with that.

Q. I will show you Government Exhibit 66 for identification that bears the inscription, "Kodachrome commercial safety film," and I will ask you if—did you state on direct examination, or you did state on direct examination, did you not, that that carton, that shelf carton, you described it as being—

A. Yes.

Q. —was contained in these big cartons, shipping cartons, 2 to 5 or 65, is that—

A. 2 to 5?

Q. May I identify it as Exhibits 2 to 5?

A. Yes.

Q. Or 65, one of five cartons?

A. Six cartons.

Mr. Downing: The question was based—was asked on the basis of Government Exhibits 2 to 5, or 65.

154 By Mr. Walsh:

Q. It was one of those five cartons?

A. Yes.

(Mr. Downing handed cartons to Mr. Walsh.)

Q. Will you show me this carton, those cartons?

By Mr. Walsh:

Q. When did you first see this Government Exhibit 65 for identification?

A. When did I first see it?

Q. Yes.

A. In connection with this particular case?

Q. Not in connection with any case. Anywhere.

A. I saw this many months ago.

Q. Where?

A. In Detroit.

Q. All right. When did you see it again?

A. Here in this courtroom.

Q. And did it contain any film at any time that you saw it?

A. I don't recall whether there was film in this originally when I saw it or not.

Q. And now you have seen Government Exhibits 2, 3, 4 and 5 before. Do you want to look at them to be sure?

A. No.

155 Q. They are these folded cartons of the same type, I assume. Where did you first see them?

A. I am not sure, but I think I saw them in Detroit.

Q. And did they have film at the time you saw them?

A. Yes.

Q. They had film in them?

A. Yes.

Q. Now, let me look at Government Exhibit 66 and I ask you if by examining this carton without examining any of the marks, such as Government Exhibit 66 for identification, or the initials, you can determine which carton that came from or was in when it was shipped?

A. Of course I can't. I know that it was in one of six cartons.

Q. One of six cartons?

A. Yes.

Q. And how do you determine—I guess you told us about—that is because the emulsion number—

A. Emulsion.

Q. Part of the shipment from that emulsion went to New Jersey, did it not?

A. No. Not part of that. Oh, the part of the emulsion number?

Q. Yes.

156 A. That is true but it was returned.

Q. Does this carton by itself, this shelf carton, show whether it was part of the New Jersey shipment or not?

A. No, but the only film out is this film that was right here in Chicago. This had to be that film.

Q. You have done that by a process of exclusion?

A. That is the only way you could do it.

Q. But you haven't brought us any records on that return, have you?

A. No.

Q. Then there is nothing other than your conclusion that all of the film came back from New Jersey that makes you certain that this package came from one of these cartons that went to Chicago, is that right?

Mr. Downing: I object to the wording of the question. Furthermore, I think the question has been thoroughly asked.

The Court: I think it is argumentative. Sustained.

Mr. Walsh: That is all.

The Court: Redirect examination?

Mr. Downing: Yes, just a few questions, Your Honor.

157

Redirect Examination

By Mr. Downing:

Q. Mr. Mayo, you were questioned with respect to these prices and you have answered a question in cross examination with respect to the basis of your knowledge of the value of this film. Will you explain to the Court and jury in what connection of your duty you used the value and which value you used in your duties?

Mr. Walsh: I object to that.

Mr. Callaghan: It is not market value.

Mr. Downing: I am asking him for the value he uses and the purpose for his using that value.

The Court: In view of the cross examination I think the question is proper. Your objection may be noted.

Mr. Callaghan: May I be heard, Your Honor? He says he predicates a value only on the basis of the shipment, and he does not predicate any value at all upon market value, and that is all we are concerned with here now.

Mr. Downing: I think the witness should be permitted to testify.

Mr. Callaghan: I have concluded my objection.

The Court: Objection overruled.

158 By The Witness:

A. In the process of loading trucks or railroad cars we limit our loading to certain values, which is within our insurance coverage, and that value is based on the list price of the items involved.

By Mr. Downing:

Q. And is that list price you refer to the retail value in the questions I asked you this morning, is that right?

A. Yes, sir.

Mr. Downing: May I have just a moment, Your Honor? That is all.

The Court: Recross examination?

Recross Examination

By Mr. Callaghan:

Q. How much did you recover from the insurance company?

Mr. Downing: I object, Your Honor. That is not proper.

Mr. Callaghan: You opened it up.

The Court: I sustain the objection.

By Mr. Callaghan:

159 Q. In what amount did you file your claim against the insurance company?

Mr. Downing: I object, not proper recross examination.

The Court: Sustained.

By Mr. Callaghan:

Q. You placed this valuation on it to protect yourself for insurance coverage, you testified on redirect examination?

A. Not necessarily to protect ourselves. To keep it within the confines of our coverage.

Q. So that in the event anything happened to that shipment, you would be made whole by the insurance company?

Mr. Downing: I object. It is not part of recross examination.

The Court: Overruled. It goes to valuation.

The Witness: What is your question?

By Mr. Callaghan:

Q. So that in the event of something happening to that shipment you would be made whole by an insurance company?

A. Yes.

Q. Now, you were made whole by the insurance company by a payment to you by the insurance company
160 in the amount of your price that appears in red figures, the prices at which you sell this merchandise to your dealer, were you not?

A. I am not familiar with it.

Mr. Callaghan: That is all.

The Court: Recross examination on behalf of defendant MacLeod?

By Mr. Walsh:

Recross Examination

Q. Do you use these retail prices, these prices to the consumers, that you have testified about for the purposes of evaluating the merchandise for insurance claims, is that what I am to understand?

A. In establishing the value on our loads we use that price.

Q. Including a tax that is never paid?

Mr. Downing: I object, argumentative.

The Court: Sustained.

By Mr. Walsh:

Q. That price includes the tax, does it not?

Mr. Downing: That has all been covered previously.

The Court: Sustained.

161 Mr. Walsh: That is all.

Mr. Downing: That is all.

The Court: That is all. You may step down.

As to this book that has been marked Defendants' Exhibit 1, you will leave that in the custody of the United States Attorney for the time being. The United States Attorney will make it available to the defense counsel for their review over the evening recess, and then whatever parts of it you agree upon are material or for your introduction in evidence, or defense counsel or for any other purpose, you may have photostated and we will accept photostatic copies. If there is any question between counsel for the government and counsel for the defense as to the materiality of any pages, I will resolve that question out of the hearing of the jury in the morning.

Mr. Downing: Thanks.

Mr. Callaghan: Can't we just extract those pages that may be material and let him have the book?

The Court: Let him have it first and then photostat them, instead of pulling them apart. I think that will
162 be better.

Mr. Downing: All right.

The Court: Then following that you can return the book.

Mr. Downing: Return it in toto to Mr. Vayo.

The Court: Yes. Very well. You are excused.

(Witness excused.)

Mr. Downing: Mr. Martin.

(Witness sworn.)

Mr. Walsh: Before we proceed with this witness, I would like to move to strike the testimony of the witness Vayo with regard to retail values.

The Court: Motion is denied. You may proceed.

WILLIAM JAMES MARTIN, called as a witness herein, on behalf of the Government, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Downing:

Q. Will you state your name, please?

A. William James Martin.

Q. M-a-r-t-i-n?

A. Right.

163 Q. In what town do you live?

A. Rochester, New York.

Q. By whom are you employed?

A. Interstate Motor Freight System.

Q. Interstate Motor Freight System, is that the name of your employer?

A. That is right.

Q. And what is the nature of your duties with that company?

A. Driver and loading trucks.

Q. Is that at the terminal in Rochester, New York?

A. Right.

Q. How long have you been employed by the Interstate Motor Freight System?

A. Three years.

Q. I direct your attention to Government Exhibit 67, marked for identification, and ask you to look at that and ask you if you have ever seen it before.

A. Right.

Q. With respect to the signature appearing on the lower right-hand side of the face of that exhibit, I ask you if that is your signature?

A. Right, it is.

Q. And when was that signature affixed thereto?

164 A. 7/8—

Q. Is that July 8, 1950?

A. July 8th.

Q. Where did you affix your signature to that document?

A. Eastman Kodak.

Q. In Rochester, New York?

A. Rochester, New York.

Q. Did you place your signature on there in the regular course of business while you were employed with the Interstate Motor Freight System?

A. Right.

Q. And was it in the regular course of your occupation at that time that you saw it?

A. My duty, right.

Q. In connection with this load represented by Government Exhibit 67, did you have anything to do with the actual loading of it into the trailer?

A. I loaded it into the trailer, right.

Q. At the time the load was loaded, was it a full load?

Mr. Callaghan: That is objectionable; that is a comparative term, what is or what is not a full load.

The Court: Yes. Ask him if he filled the truck.

165 By Mr. Downing:

Q. Did the load fill the truck?

A. No, it didn't fill the truck.

Q. Approximately what portion?

A. About three-quarters of the way.

Q. About three-quarters full?

A. That is right.

Q. Were the cartons placed therein full cartons?

A. Right.

Q. And were those cartons sealed at that time?

A. They were all sealed, right.

Q. After loading the cartons inside the trailer, then what took place?

A. We have to cover the trailer on the back end with paper, waterproof paper, like photo paper, two sheets.

Q. Is that heavy paper?

A. Heavy paper, two sheets.

Q. Then what did you do?

A. We taped the sheets together, tight, so that it will prevent water from getting the merchandise wet, and then from then on we wait for the checker to get his bills in there—the checker has to have his bills. After that—

Mr. Callaghan: I object to what the checker did or has to do, and I move to strike it out.

166 The Court: Yes. Ask another question. That may be stricken.

By Mr. Downing:

Q. What did you do after you put the paper there and sealed it?

A. Draw the load out and have it sealed.

Q. And did you check the load to determine whether or not it was sealed?

A. Yes, sir.

Q. Were there seals on the load at the time, after you have loaded it and before you took it out of the lot?

A. No, we have to take it outside the door and then seal it, outside of Eastman's doors, and then seal it and then we get the bill.

Q. Were the seals affixed thereto?

A. The seals were on before the bill was signed.

Q. At the time you signed Government Exhibit 67, as you have testified, were the seals on that trailer?

A. Yes, sir.

Q. Then what took place after you put your signature on that exhibit?

A. We sign the bills, get the bills, and I draw the load back to the terminal.

Q. Is that the terminal of the Interstate Motor 167 Freight System at Rochester?

A. Right.

Q. Then what took place?

A. I turned the bills over to the despatcher to be billed.

Q. And what did you do with the trailer?

A. Left it in the yard for another driver to pick it up.

Q. Do you know the driver that picked up that particular load on that date?

A. I know him but I can't think offhand of his name.

Q. To refresh your recollection, was it Van Loon?

Mr. Callaghan: I object to that. He said he did not recollect his name. He said he doesn't know his name.

The Court: You may ask the question.

By Mr. Downing:

Q. Do you know, was it Van Loon?

A. Van Loon was the man, right.

Q. And is that the last that you had to do with that trailer on that particular day?

A. That is right.

Q. All of that took place in Rochester, New York on or about July—on July 8, 1950?

168 A. The same day, right.

Mr. Downing: At this time, if Your Honor please, I would like to offer in evidence Government Exhibit 67, and they may cross examine.

The Court: Very well. I will hear any objections after the cross examination. Do you want to start? Your defendant is named first in the indictment?

Mr. Callaghan: I don't want always to be first.

The Court: You may proceed, then.

Mr. Walsh: I don't know how he jockeyed me out of this seat.

Cross Examination

By Mr. Walsh:

Q. With regard to this Mr. Van Loen who picked up the load, did you see him pick it up?

A. I didn't see him take the load out, no.

Q. What do you base that conclusion on?

A. Because he was the only one driver there to take it to Chicago.

Q. And because he left and the load left, you assumed he took it?

A. I assumed the load went with him.

Q. Where does this bear your signature, "W. J."?

A. That is right, and the date.

Q. That is your receipt to the Eastman Company?

A. That is right.

Q. For this load?

A. We are responsible for that load after we sign for it.

Q. Who sealed it, who sealed the load?

A. The checker at Eastman sealed it. We don't seal it.

Q. But outside their premises?

A. No, right on their property, outside the door, where the loading platform is.

Q. Maybe I misunderstood, but did you tell us on direct examination that you drew the load outside their gate?

A. Outside of underneath the building—we are in an enclosed building, the trailer is enclosed, and the doors come down, and you have to pull the trailer outside to close the doors. You are not out of Eastman's yards at the time. Eastman's yard is fenced around.

Mr. Walsh: That is all.

Cross Examination

170 By Mr. Callaghan:

Q. Where did you go on July 8th?

A. Where did I go? I came back to the terminal with the load after I left Eastman.

Q. You left the Eastman plant and you went to the terminal of your employer?

A. That is right, the Interstate Motor Freight system.

Q. And you backed your truck up to their dock there and you left it and walked away from it?

A. That is right, Sir.

Q. Then you went home, did you?

A. My duties were done at that time, yes.

Q. When was the next time you picked up a load at Eastman?

A. The first part of the next week, the following week.

Q. A week after July 8th?

A. No. Starting Monday.

Q. When during the week of July 8th had you at any other time been in the Eastman yard in connection with a load?

A. Before or after?

Q. Any time during the week of July 8th?

A. I load there practically all week.

171 Q. Practically every day?

A. Yes, sir.

Q. And do you take loads from the Eastman plant to your dock and then quit, or do you sometimes drive these loads then to their final consignee?

A. Just drive them from the Eastman Kodak park to the dock.

Q. You are not an over-the-road driver?

A. No, sir.

Q. You are a city man?

A. Yes, sir.

Q. That comprises your entire line of occupation, Mr. Martin, is taking of loads from Eastman to your dock?

A. Outside of delivering in the city.

Q. I see. How many loads a day do you take out of Eastman?

A. At times it varies. Sometimes one, sometimes five. I don't always—

Q. Sometimes one, sometimes five, per day?

A. Yes. I don't always get the loads to take out.

Q. How many trucks did you load on the day of July 8th?

A. One.

Q. Was that all you did that day?

A. That is all I had to do that day, right.

172 Q. Was to load one truck and take it to your dock and then go home?

A. Yes.

Q. How long did it take you?

A. The time varies on the load. If they have enough merchandise to fill our load, the trailer—

Q. How many trucks did you load on July 9th?

A. Not any.

Q. How many did you load on the 10th?

A. I can't remember.

Q. How many did you load on the 7th?

A. I don't remember.

Q. Your particular knowledge about July 8th is predicated upon the fact that you have looked at Government Exhibit 67, is that true, Mr. Martin?

A. Not only that, no.

Q. Independently of every other day from July 8th—by the way, you are still at that same job, aren't you?

A. Yes, sir.

Q. Having regard to the fact that every day for several months before July 8th, and now, up until today, May, 1951, you have done the same thing, you are able to say without refreshing your recollection at all, that on July 8th you loaded only one truck?

A. That is right.

173 Q. But you cannot tell us any other particular day that you may select how many trucks you may have loaded, can you?

A. I can tell you why.

Q. Can you or can't you?

A. Not all, no.

Q. Can you select any day other than July 8th and tell me how many trucks you loaded that day?

A. Yes, I can tell you how many I loaded before I came up here.

Q. Yesterday?

A. Not yesterday, no.

Q. How many trucks did you load on May 21st?

A. I have to refresh my memory on that.

Q. Did you have anything to do with the making of this waybill or whatever we may call it here, this bill of lading?

A. No, sir.

Mr. Callaghan: That is all.

Redirect Examination

By Mr. Downing:

Q. Will you explain why you recall this particular shipment on July 8th?

174 Mr. Callaghan: I object to his explanation as to why he recalls. That was a purely voluntary response of the witness and not a response to any question on cross-examination. He volunteered that, the question was not asked him, and I object to the nature of the redirect examination.

The Court: Overruled. You may answer.

By Mr. Downing:

Q. Will you explain why you recall this particular shipment on July 8, 1950?

A. Because it is the only Saturday I have had to load a load at Eastman Park.

Mr. Downing: That is all.

The Witness: That was the day after a holiday which the fellows worked the following week, worked Saturday so that the following week before was a holiday and they had two days off instead of one.

Mr. Downing: That is all.

The Court: Recross examination?

Recross Examination

By Mr. Callaghan:

175 Q. Do you know when this load—

3 The Court: Wait a minute. He is next.

Mr. Callaghan: I beg your pardon.

Recross Examination

By Mr. Walsh:

Q. July 8th was a day after a holiday?

A. No, not July 8th.

Q. Tell us about that.

A. The week before was the 4th of July, right, on a Monday or Tuesday? Well, this was a Saturday, July 8th—

Q. You said the previous week. July 8th was a Saturday, is that right?

A. That is right.

Q. Do you recall that distinctly without consulting anything?

A. Yes. That is the only Saturday I ever loaded a load at Eastman, on a Saturday.

Q. The 4th of July then was within, between Monday and Saturday, wasn't it?

A. The following week was—Saturday was the day we loaded, the week before—before that, or the days before that, the holiday which they had, made a three-day holiday for them instead of a one-day holiday over the 176 week end. Right?

Q. Well—

The Court: Have you any other questions?

Mr. Walsh: I will have to consult my records to answer his question.

Yes, I have.

By Mr. Walsh:

Q. Incidentally, Mr. Callaghan asked you where you went when you left the Eastman Kodak Company with this load.

Mr. Downing: I object.

By Mr. Walsh:

Q. You went to your yard, is that what you told us?

A. The terminal.

Q. The terminal?

A. Yes.

Mr. Downing: I object to the recross examination. I asked no such question on redirect examination.

The Court: Sustained. You are limited to what was asked on redirect examination.

Mr. Walsh: Things have been brought out by—

The Court: One at a time, and you are not the prosecutor here. You are limited on your cross examination 177 to what the prosecutor asked on redirect examination.

He asked one question concerning how he remembered the day he made this load. You are limited to recross examination as to that, and not as to Mr. Callaghan's cross examination but to the government's redirect examination.

Mr. Walsh: I submit, Your Honor, that I should be given leave to ask a few additional questions as cross examination.

The Court: Denied.

Mr. Walsh: That is all.

The Court: Recross examination by Mr. Callaghan?

Mr. Callaghan: That is all, Mr. Martin.

Mr. Downing: That is all.

The Court: That is all.

(Witness excused.)

The Court: Recess for ten minutes.

(Recess taken.)

The Court: Objections, if any, to Government Exhibit 67?

Mr. Callaghan: I would like to make the general and all embracing objection, no sufficient foundation laid for its introduction. This man has testified only to matters of pure hearsay. He knows nothing about how it was made except it looks like it was a document that comes from the Eastman Kodak Company.

The Court: Do you have any objection, Mr. Walsh?

Mr. Walsh: The same objection.

The Court: Very well. Each and all, overruled. Government Exhibit 67 will be received in evidence.

(Said exhibit, so offered and received in evidence, was marked Government Exhibit 67.)

Mr. Walsh: Before we start, we made a general agreement that one objection would stand to both, to each defendant, if it could apply.

The Court: Yes, I think that was made in chambers when we were discussing the matter before we started the trial, but it is not on the record.

Suppose you state it for the record, so it will be there for your protection.

Mr. Walsh: Defendant MacLeod asks the record show that when an objection is made on behalf of the defendant Gordon or on behalf of the defendant MacLeod, if it is applicable to both defendants, that it stand for both defendants.

The Court: Yes. It has been so agreed by counsel, and let the record so show.

180 DR. EARL J. FLICK, called as a witness on behalf the Government herein, having been first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Downing:

Q. State your name, please.

A. Dr. Earl J. Flick.

Q. What town do you live, Dr. Flick?

A. In Huntington Woods. I live in Huntington Woods Michigan, and practice in Royal Oak, Michigan.

Q. What town?

A. Royal Oak.

Q. Are both of those towns suburbs of Detroit, Michigan?

A. Yes.

Q. How long have you been licensed to practice a physician and surgeon?

A. Since 1937.

Q. And you practice exclusively in the State of Michigan, do you?

A. I do.

Q. Directing your attention to July and August, 1937, were you acquainted with a person by the name of Schwartz?

181 A. Yes.

Q. Are you acquainted with the type of business Schwartz was in at that time?

A. He was a wholesale jeweler.

Q. Do you recall the location of the jewelry store at that time?

A. In the Metropolitan Building in Detroit.

By The Court:

Q. In where?

A. Detroit, Metropolitan Building.

By Mr. Downing:

Q. That is Detroit, Michigan, is that right, sir?

A. That is right.

Q. I show you Government's Exhibit 66 marked for identification and I ask you to look at it.

Mr. Downing: 66, your Honor.

The Court: Thank you.

By Mr. Downing:

Q. 66, and ask you to look at it, and ask you if you have seen that exhibit before?

A. Yes.

Q. With respect to that exhibit, does it bear your initials?

A. It does.

182 Q. Are those initials E. J. F. appearing on the cover of the document?

A. E. J. F.

Q. On what date were those initials placed thereon?

A. On the date that is here, that is August 28th, 1950.

Q. With respect to that film, from whom did you purchase it?

A. From Mr. Al Schwartz.

Mr. Callaghan: That is objected to. There is no evidence he purchased it from anybody.

The Court: State from whom you got it.

Mr. Downing: Strike that question.

By Mr. Downing:

Q. From where did you get the film contained in Government's Exhibit 66 marked for identification?

A. From Mr. Al Schwartz.

Q. Approximately when did you secure it?

A. In the latter part of July or the first part of August 1950.

Q. How much did you secure from Al Schwartz at that time, how much film?

A. 20 rolls.

183 Mr. Callaghan: That is objected to, if your Honor please, if it is something that occurred outside the presence of these defendants we are not bound.

The Court: Overruled. I am permitting this witness out of order on the Government's representation that they will connect it up with the case. I presume they will do so. If they do not, I am cautioning you of the danger.

Mr. Downing: I understand.

The Court: He may answer.

(Last question read.)

By the Witness:

A. 20 rolls.

By Mr. Downing:

Q. Was that the same type as the type in the exhibit which you have in your hand, Government's Exhibit No. 66?

A. It was all the same.

Q. Do you recall how much that you paid for each of the rolls?

A. \$5 a roll.

Q. What did you do with the quantity of film that you purchased from that individual on that day?

184 A. I took pictures of six rolls. They were sent in to the Eastman Kodak Company and processed and returned to me.

Q. And the balance of the rolls?

A. One roll of it I gave to Mr. Joseph Sullivan to find out whom if he could—

Mr. Callaghan: Wait a minute. I object. This calls for a conversation.

The Court: Yes.

By Mr. Downing:

Q. You just gave it to Mr. Joseph Sullivan?

A. Mr. Joseph Sullivan. The other three—thirteen rolls were given to a Mr. Shearer, an Agent of the FBI. They were all given to Mr. Shearer on the date that is listed on this box.

Q. That is the date with your initials on, August 28, 1950?

A. On each box I initialed and signed the date.

Q. And each of those films were the films that you had obtained at this Schwartz jewelry establishment, is that right?

A. That is right.

Mr. Downing: You may cross examine.

The Court: Who wants to go first time, you?

185 Mr. Walsh: It is his turn.

Mr. Callaghan: It doesn't make any difference.

Cross Examination

By Mr. Callaghan:

Q. Doctor, when is the last time you saw this box that has the initials on it, E. J. F.?

A. I saw it this morning, was the last time.

Q. When prior to this morning?

A. On August 28, 1950, when I gave it to Mr. Shearer.

Q. Is it in the same condition now as it was at the time you gave it to Mr. Shearer?

A. Yes, it is.

Q. How many other cartons did you give Shearer at the same time?

A. 13 in all. The total was 13.

Mr. Callaghan: That is all.

The Court: Do you have any questions, Mr. Walsh?

Mr. Walsh: Yes.

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Cross Examination

By Mr. Walsh:

Q. This film that you used, that you took pictures on you sent that for developing, did you?

A. I did.

Q. And then you gave one to Sullivan and 13 to—

A. Mr. Shearer.

Q. Have you ever bought film of this type before?

A. No, no. This was the first time I had ever seen that type of film.

Q. Did you use it in a movie camera? It is a movie film?

A. It is a movie 16 millimeter Kodachrome film.

Mr. Walsh: That is all.

The Court: Any redirect?

Mr. Callaghan: I overlooked to ask a question. May I, Judge? Would you indulge me?

The Court: You may.

Cross Examination (Ctd.)

By Mr. Callaghan:

Q. This roll, has it been developed?

A. No.

Q. This is a roll you have never used?

187 A. That is a roll I did not use.

Mr. Downing: By "this roll" you are referring to what?

Mr. Callaghan: To Government's Exhibit 66.

By Mr. Callaghan:

Q. That has never been out of the box so far as you know?

A. No.

Q. How many did you send in to the Eastman Kodak?

A. Six rolls.

Q. Six rolls?

A. Yes.

Q. Were they developed by the Eastman Company?

A. They were developed and returned to me.

Q. Did they charge you for them?

A. No. There is no cost of processing.

Q. Do you know what the cost of developing those rolls would have been had you taken them to an independent developer?

Mr. Downing: Objection, your Honor. That is immaterial in so far as this case is concerned.

The Court: Sustained.

By Mr. Callaghan:

Q. Did you ever develop any film such as this, Mr. 188 Witness?

Mr. Downing: Objection, your Honor, as immaterial.

The Court: Did he ever develop it himself?

Mr. Callaghan: Yes.

The Court: What is the materiality?

Mr. Callaghan: Maybe this man is an expert in this field. I want to find out if he is.

The Court: That was not gone into on direct. He was not put on as an expert. I don't think it is proper cross examination, even if he happens to be one.

Mr. Callaghan: All right. That is all.

The Court: Any redirect?

Mr. Downing: Just one question.

Redirect Examination

By Mr. Downing:

Q. Were the other boxes that you turned over at this time, Government's Exhibit 66 marked for identification, of the same type and size as this?

A. Yes.

Q. That is, to Mr. Shearer?

A. Yes, that is right.

189 NICHOLAS KEYES, called as a witness on behalf of the Government herein, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Downing:

Q. State your name, please.

A. Nicholas Keyes. I live here in Chicago.

190 Q. Are you employed at the present time?

A. No. I am retired.

Q. Will you keep your voice up as strong as possible so that the court—

A. I can't hear very good, either.

Q. Directing your attention to July 10th and 11th, 1950, by whom were you employed on that day?

A. On which date is that?

Q. July 10th and 11th, 1950.

A. I was with the Interstate.

Q. Is that the Interstate Motor Freight System?

A. Yes.

Q. What location? What was the address of where you were working?

A. 1833 South Canal.

Q. 1833 South Canal?

A. Yes.

Q. Just briefly what was the nature of your duties while you were so employed?

A. I was supposed to be the watchman there. I was the watchman.

Q. Approximately from what time until what time were you so employed?

191 A. Well, from sometime in the latter part of June, 1942, until last October I was in the same yard but I worked for a different company. The last three months I was there, soon after that time you speak of I went over with another company.

Q. What was the name of the second company that you worked at the last three months?

A. That was the Interstate Service.

Q. That was the Interstate Service?

A. That was the Interstate Service.

Q. That was the Interstate Service?

A. Yes.

Q. Now, I show you an exhibit which is marked Government's Exhibit 70, marked for identification, and ask you to look at it and ask you if you have ever seen it before?

A. Yes. My name is on here. Yes.

Q. You refer to that as having your name. Is that the signature appearing on the lower line of that document?

A. Yes.

Q. And approximately on what date did you place your signature on that document, on the date the document bears?

A. Yes, that should be, I think, early on Monday 192 morning.

Q. Is that the date that is stamped to the right of your signature?

A. Yes, that is, 11:31, isn't it?

Q. 1:31 a.m. on July 10th?

A. Yes. Let us see. I have to make that out for sure. Well, whatever day was in question.

Q. Did you place your signature at the time?

A. Yes, just as quick as I go he gets a copy back.

Q. By "he" to whom are you referring?

A. The driver that took that order in.

Q. Is that the driver of the truck, that is the same truck and trailer, that is the same?

A. The driver of this here 16—

Q. 1652?

A. 1652.

Q. Now, did you place your signature on there while you were employed and in the regular course of your duties?

A. Yes.

Q. Was it the regular course of your duties with the Interstate Motor Freight System to sign such documents?

A. Yes, sure. I was told, that was what I was told to do, to give them loads out and check them in.

Q. That was a part of your duties usually to check 193 in loads?

A. Yes. There is lots of them down there like that.

Q. At the time that the trailer that is described in that exhibit, at the time the trailer which is described in that exhibit came into the lot, the Interstate Motor Freight System, did you check the trailer?

A. Yes.

Q. Will you describe its condition with respect to the outward appearance of the trailer at that time?

A. If it was otherwise they would have reported it. It must have been in all right condition.

Mr. Callaghan: I move that be stricken out, "all right condition".

The Court: It may be stricken.

By Mr. Downing:

Q. What is your best recollection?

A. My best recollection, them trailers is always in good orders. Everything was all right about them. I go even around the trailer. It has sometimes side doors on it.

Q. Did you check to determine the condition of the seals at the time?

A. Yes, I am supposed to. That was my business to.

Q. What is your best recollection with respect to 194 that trailer with respect to the seals?

A. I know it must have been all right.

Q. After you placed your signature on that document, what did you next do in connection with that trailer after checking it?

A. There is a sheet there on the desk. You have to put down the number of the tractor that hauled it, and the number of the trailer in question and the time he arrived. That is, you have to put the seal time on it.

Q. That is the time stamp on the lower righthand corner?

A. Yes, in this corner. You put it down with the number.

Q. I show you Government Exhibit 17, marked for identification, and ask you to look at that. Just take your time, and ask you if any of your writing appears thereon in connection with your duties.

A. Yes. Yes, here is that trailer, 662 and 1652.

Q. The trailer number is—

A. 1652.

Q. That—

A. Rochester, come in at 1:31, this is right here.

Q. That is, at the same time and the date that is stamped on that exhibit?

A. Yes. That is blurred a little bit, my name and 195 handwriting.

Q. That is your handwriting on the line, is it, sir?

A. Yes. Several of those right near there. There was more trailers there.

Q. Did you affix that writing on that exhibit while you were regularly employed by the Interstate Motor Freight System?

A. That is true.

Q. Was it your regular duty to so do when trailers came in while you were on the tour of duty?

A. On Saturday night and Sunday night I took care of this sheet.

Q. That is this sheet that you have in front of you?

A. Yes. They billed this thing out. I gave him a copy back. It would appear like this, mostly pink copy. Marked it down here so everybody would know what they were doing, what came in, and so forth.

Q. All right. Approximately what time, what time did you go off duty as best you recall?

A. Around seven o'clock that morning.

Q. Thereafter when did you come back to duty?

A. Well, this evening, the same day. That is, I couldn't swear to.

Q. Your best recollection?

196 A. As near as I can recollect I came back at ten o'clock that night. During the week I only work eight hours. On Saturday and Sunday I work longer.

Q. This was the following day, which was what day of the week?

A. That would be Monday, I think.

Q. That is your best recollection?

A. Yes.

Q. Do you have more?

A. No. I would not be in the office only it was Saturday night and Sunday night.

Q. Now, at the time you commenced duty on this Monday night, what did you do with respect to the trailers that were in the lot at that time?

A. Well, I went to look them over the first thing and I saw a lot of white paper outside of one. I went down there. I thought to myself—

Mr. Callaghan: Just a minute, Mr. Witness. You are not permitted to say that.

By Mr. Downing:

Q. Just tell us what you saw.

The Court: That may be stricken.

By The Witness:

A. I looked over this trailer in question there and it 197 appeared as though it was unloaded during the day, when I came back at ten o'clock.

Mr. Callaghan: I move that be stricken.

The Court: It may be.

By Mr. Downing:

Q. What did you see, Mr. Keyes, with respect to the ground surrounding that trailer?

A. Right behind that trailer looked like it was swept away, a lot of white paper on the ground.

Mr. Callaghan: I move it all be stricken except there was some white paper on the ground. That is not objectionable.

The Court: That may stand.

By Mr. Downing:

Q. With respect to the doors of the trailer, did you look at the doors at that time?

A. Yes.

Q. Do you recall the condition of the doors?

A. There was either no seal on it or a broken seal. There was indication it was unloaded.

Mr. Callaghan: I move that be stricken, if your Honor please.

The Court: The question was what?

(Question read.)

198 The Court: The last part may be stricken.

Mr. Downing: After the indication it was unloaded?

The Court: From there on, yes.

By Mr. Downing:

Q. Is that the only thing you had to do with that trailer that you can now recall?

A. Yes.

Q. After that you didn't have anything to do with it?

A. With that one, that is all. I figured I was done with it then.

Mr. Downing: You may cross examine.

Cross Examination

By Mr. Callaghan:

Q. Mr. Keyes, what is your first name?

A. Nicholas.

Q. Nick?

A. Yes, Nicholas.

Q. How many trailers came into that yard that night, do you remember?

A. I don't know. No, I couldn't remember that.

Q. Could you tell by looking at Government's Exhibit 71 how many came in that night?

199 A. I could remember pretty well by looking at this.

Q. Will you do so, please?

A. Yes.

Mr. Downing: Keep your voice up.

Mr. Callaghan: He is counting.

Mr. Downing: Oh, pardon me.

By The Witness:

A. It looks to me like there were only about four trailers, or five trailers came in.

By Mr. Callaghan:

Q. Only four or five?

A. Yes.

Q. Five at the outside?

A. Yes. There is two I received.

Q. How many?

A. That is two. Maybe there was six, and four over there in Chicago, three or four came in.

Q. Four?

A. Yes.

Q. By these four you mean beginning with the word—

A. No, no.

Q. —beginning with the word “Louisville”?

A. Yes.

200 Q. Down to the word “Rochester”?

A. Yes.

Q. Louisville, Rochester—

A. Yes, Erie.

Q. Erie and Rochester?

A. Yes. And then here is two more from Milwaukee.

Q. Two from Milwaukee, four, that would be five trailers?

A. Five loads.

Q. Five loads came in?

A. I think there is no other.

Q. How do you know from looking at this sheet, and by “this sheet” I mean Government’s Exhibit 71, that those trucks came in on July 10?

A. This is one made out, a new one was made out every night.

Q. Because this bears the date July 10, 1950?

A. Yes.

Q. On July 10, 1950, was a Monday, wasn’t it, Mr. Keyes?

A. Yes. We really started off Monday morning. There is very little done on Sunday night.

Q. This sheet does not come into play then until after midnight Sunday?

201 A. It is not supposed to because they made out one for me because they knew I was to be alone. I was supposed to be watchman and take care of that a little bit.

Q. In other words, this sheet, what you are trying to show me, this sheet dated July 10th was in reality made on

Sunday night, July 9th, because you were going to come on duty and it was made for you before you came on?

A. Yes.

Mr. Downing: If your Honor please, I think Mr. Callaghan said inadvertently May. I think he means July.

Mr. Callaghan: If I said May, I mean July. Thank you.

By Mr. Callaghan:

Q. Were you working for anybody else July 10th?

A. No.

Q. Did anybody else use that yard other than the Interstate Motor Freight System?

A. Well, I often see a stray driver in. He may mistake the place, or something.

The Court: I think, Mr. Callaghan, you better stand at the end of the jury box there.

Mr. Callaghan: I want to be here for this part of the examination.

202 The Court: You are through with the papers. I see the jurors on the end can't hear him. If you can hear him, they can't.

Mr. Callaghan: Thank you.

By Mr. Callaghan:

Q. Do you know who the driver of that tractor was?

A. No, all I could know—

Q. Is a number?

A. Yes. I would know who drove them.

Q. Yes. Where did you get that number? From where did you get that number?

A. That number on the tractor?

Q. Yes.

A. It is on all them tractors mostly.

Q. From where did you get that? Did you get it by looking at the tractor?

A. No. It is on the bills. He brings them bills in and trip record.

Q. The driver brings in a trip record?

A. Yes.

Q. The trip record then is a document identified here as Government Exhibit 70, is it, Mr. Keyes?

A. Yes. That is the same thing. Then he gets a copy like that.

203 Q. Do you know who the Kenley Rex Trucking Company is?

A. Yes. They are the ones from Fort Wayne. One of their drivers took in that load.

Q. Is that a different concern than the Interstate Motor Freight Company?

A. Yes. Well, he is a man that has maybe three or four dozen of those trailers, real good trailers to put that stuff in, that Eastman Kodak. He hauls mostly that.

Q. Was that the driver who delivered this load to—

A. No, he would not be Kenley.

Q. I have not finished my question. Was the driver who delivered this load an employee of the Kenley Rex Trucking Company who brought this into your yard?

Mr. Downing: I object unless he knows.

By The Witness:

A. He would be paid by Kenley.

A. Yes.

Q. It is a Kenley driver?

A. Yes.

Q. From Fort Wayne, Indiana?

204 A. Yes.

Mr. Callaghan: I guess that is all.

The Court: Mr. Walsh, any cross examination?

Cross Examination

By Mr. Walsh:

Q. Where was this trailer parked with respect to the office or desk where they kept this Government's Exhibit 71, that is the sheet, showing the truck?

A. What is it?

Q. Do you have a shanty?

205 The Court: The man is hard of hearing. You have to speak loudly.

By The Witness:

A. No. I go right into the main office.

By Mr. Walsh:

Q. You had an office?

A. There is a main office there. You go right in.

Q. That is enclosed—is it?

A. Oh, yes, pretty well enclosed. I had a key to it. Whenever a driver came around with a load, aimed to look the load over first.

Q. Did your duties keep you in your office during the night?

A. On Saturday night and Sunday night, had been going a good little while.

Q. You stayed in the office?

A. No, I go in the office. When I see somebody come along, some fellow come along with a load, he would want to get the trailer marked up on the sheet. I would want to give the slip like that, a small one you have there.

Q. Where did your duties take you the rest of the time?

A. Anywhere I want, like around the place.

Q. Around the yard?

A. Yes.

206 Q. If you were in the office, would you see this trailer where it was parked?

A. Sometimes you could, but not always. You have to go to be sure of your work. Then you would have to be sure the shape it was in, whether it was all right or not.

Q. Well, now, what did this trailer have on it in the way of printing, do you recall?

A. In the way of what?

Q. Printing, words, signs? Did it have any signs on it?

A. Oh, you could tell them trailers, as far as you could see them. You could tell when it said "1652" there. You could tell it was a Kenley trailer when I saw it.

Q. Did it have Kenley on it?

A. Yes.

Q. Printed on it?

A. Mostly all of them is Kenley on them.

Q. It does not have interstate?

A. On the front end, yes.

Q. It does not have interstate?

A. On the front end, yes.

Q. It does not have interstate on it?

A. No, I don't think they have interstate on them.

Q. Were the doors on the sides or in the back?

A. The doors were in the back, all the time in the
207 back, but occasionally there is doors on the side of some trailers.

Q. Were there any doors on the side of this one?

A. I couldn't tell. That is too long. I have not been brought up to know anything like that.

Q. You are retired?

A. What?

Q. You are retired?

A. I don't work for them any more.

Q. Now, when you went up to this—you were off, then, you finished your employment for the night, is that right, and left after you received this trailer?

A. I had to stay there until morning. Somebody else came along. Some of the office force came along.

Q. When was it that you noticed that the trailer was, that this paper was on the floor?

A. That was the next evening, Monday evening. It was the same day.

Q. You went home in the morning?

A. Yes. I went home in the morning.

Q. When your relief arrived?

A. Around seven o'clock.

Q. Then you slept, I assume?

A. Yes.

Q. Then you came back to work?

A. Yes.

208 Q. That was the first time that you noticed that there was paper on the ground, is that right?

A. I figured right away they unloaded the trailer, which they did unload here every Monday, maybe more.

Q. You just assumed it had been unloaded?

A. Yes, that is correct.

Q. You did not look at the doors on the side, if there were any?

A. No. When I saw the seal gone off, it did not look like a loaded trailer. I figured it was an empty trailer and had been empty during the day when the papers were all there.

Q. Was it empty?

A. Well, I couldn't say it was empty, but you see, I took it for an empty trailer.

Q. You paid no more attention to it, then, during your watch that night?

A. No, unless I would look at the tires. Often they will take tires from there.

Q. Did you look at it before you were relieved in the morning before you went home?

A. I looked at it. I had to look at it because I couldn't go by on the limited road. I had to go through without seeing the trailer. I had to look at them all close, especially that one.

209 Q. You looked at them?

A. Yes.

Q. And the seal was on?

A. I looked at the tires on the other trailers, whether

there is any on it or not. That is all I have to look at when they are loaded.

Q. Did you check the doors?

A. I did not check them on that. If there was no seal or there was only a broken seal—

The Court: He is talking about Monday night and you are talking about Sunday. Let us get together.

Mr. Walsh: All right.

By Mr. Walsh:

Q. Monday morning, when you went home—

A. Yes.

Q. —and on your way home—

A. Yes.

Q. —as you left the yard, did you check this trailer before you left and went home?

A. Monday morning?

Q. Yes.

A. Yes, sure. It was loaded that night. The men had just brought it about five hours before that.

Q. When it was brought in, you looked at it?

210 A. Yes.

Q. Did you look at it again before you went home?

A. Yes.

Q. Checked it?

A. Yes. The last thing I do is to look them all over, then give myself time to look at them and to go on in.

Q. Go on in to the office?

A. Check it.

Q. Check it and go home?

A. Yes.

Q. Now, did the trailer stay there that night after you returned, Monday night?

A. Yes.

Q. Was the trailer there that night, all night with you?

A. Yes.

Q. It did not leave while you were on?

A. No.

Q. It was there when you went home that morning?

A. That morning, too.

Q. Yes. When you came back to work again on Tuesday night, was the trailer still there?

A. Well, I don't remember that. They told me, they called me during the day and asked me.

Q. Somebody called you during the day?

211 A. Yes, the Interstate.

Q. You did not look in the yard to see whether it was there?

A. I told them I thought that trailer was empty. I saw the door was open when I came to work Monday night.

Mr. Callaghan: One question I overlooked.

The Court: You may ask.

Cross Examination

By Mr. Callaghan:

Q. When you noticed the paper on the ground in back of this truck, was it Monday evening you noticed the paper?

A. Yes.

Q. Did you report that those seals were broken?

A. I didn't say a word about that because it looked to me like the rest of it was empty.

Q. Mr. Keyes, you did not report to anybody?

A. I did not say anything about it.

Q. Did you look in the trailer?

A. Did I look in the trailer?

Q. Inside.

A. No.

Q. The doors were not open, were they?

A. No, the doors were closed but the seals were broken or gone altogether.

212 Q. You don't know which?

A. Sometimes—

Q. Not sometimes, tell us, Mr. Witness, what in this instance, was the seal missing or was it just broken or do you remember? We can't guess.

A. I can't exactly remember it now. I told them the shape I found it in when I came back at that time.

Q. Which shape it was in, you don't know whether the seal was broken or whether the seal was entirely off the truck?

A. They did not often put them back. Twist them up a little.

Q. How many seals was on that truck when it arrived?

A. Just one.

Q. Just one?

A. Yes.

Q. Where was that seal, on the back door or side door?

A. On the back door.

Q. Wait, please. Was that seal within reach of a person standing on the sidewalk or rather, standing at the back of the truck, the seal that was broken?

A. Yes.

Q. I am not trying to assume it was broken. We still have not got an answer whether it was broken or missing.

You are not sure it was broken or missing?

213 A. Not now, no.

Q. The seal that was supposed to be on the bottom part of that door was either broken or missing?

A. Yes.

Q. There was only one seal on that truck. There were not two seals?

A. No.

. . .

214 MICHAEL PELLEGRINO, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Downing:

Q. Will you state your name, please?

A. Michael Pellegrino.

Q. In what town do you live, Mr. Pellegrino?

A. Chicago, Illinois.

Q. What is your business or occupation?

A. Truck driver.

Q. By whom are you employed, sir?

A. Interstate Motor Freight System.

Q. Will you keep your voice up, so the Court and jury can hear you, and counsel here, can hear you, too?

A. Yes.

Q. How long have you been employed by the Interstate Motor Freight System, as best you can recall?

A. About February, 1949.

Q. Were you so employed on July 11, 1950?

A. Yes, I was.

Q. Now, directing your attention to July 11, 1950, did you, in the course of your business, have occasion to see a trailer 1652-K?

A. Yes.

215 Q. Where was it at the time you first saw it?

A. It was parked in the Interstate Motor Freight System lot.

Q. Where is that lot located?

A. 18th and Canal.

Q. What time in the day was it when you first saw it on that day, approximately?

A. About ten minutes after 8:00.

The Court: In the evening or in the morning?

By Mr. Downing:

Q. Was that about ten minutes after 8:00 in the morning?

A. In the morning.

Q. About ten minutes after 8:00 in the morning?

A. Yes.

Q. Will you describe the trailer as you found it at that time and place?

A. Well, I had the freight bill and I noticed the number and I hooked up to it. I walked around and checked the seals like we check on every trailer. I noticed there was no seal on the trailer. I found a lot of white paper on the outside of the trailer on the floor. Well, I went upstairs and I reported it to my dispatcher.

Q. What was his name?

A. Robert McGrath.

216 Q. In connection with this white paper that you saw, did you look at that white paper?

A. Yes.

Q. Can you describe its texture, that is, whether it is heavy or light?

A. Well, it is—it is a smooth finished paper.

Q. I see. With respect to the seals, did you look to determine whether or not there were any seals on the trailer at that time?

A. There was no seals on the trailer.

Q. Do you recall how many doors there were?

A. There was two doors on it.

Q. Where were they? Where were the doors located?

A. There is a side door on the side of the trailer. There was a back door.

Q. All right. After you reported it to your dispatcher, Mr. McGrath, what did you next do then in connection with it?

A. They told me to pull around the front, in front of the terminal. McGrath and Mr. Christofferson, they came down and they told me to open up the doors. We opened

up the doors. It appeared as if there was freight missing.

Mr. Callaghan: I object to that.

By Mr. Downing:

217 Q. What did you see after you opened the doors?

Mr. Callaghan: I move that be stricken, if your Honor please.

The Court: The last part may be stricken. He may answer this question.

By Mr. Downing:

Q. What did you see after you opened the doors? Describe the contents, as you saw it.

A. Well, it was—the way the trailers are usually loaded, they come all the way to the back door. This was not loaded like that. There was an opening.

Q. There was some space between where the cartons on the inside were and the back door?

A. That is right.

Q. Was there any white paper in front of the back door?

A. None at all.

Q. Who was Mr. Christofferson?

A. Our terminal manager at the time.

Q. At that time?

A. Yes.

Q. Thereafter, after looking on the inside of the trailer, then what did you do?

A. The dispatcher told me to take it over to the Eastman Kodak Company and when I got over there Mr.
218 Hawkins, the receiving clerk over there, they had already called him and told him. He took charge of the trailer from there on.

Q. When you reached the Eastman Kodak Company, where was that located at that time?

A. It is located at 18th and Indiana.

Q. Here in Chicago, Illinois?

A. Yes.

Q. Did you turn the load over to Mr. Hawkins, the gentleman you have just referred to?

A. That is right.

The Court: Is that Hawkins?

Mr. Downing: That is Hawkins, H-a-w-k-i-n-s.

By Mr. Downing:

Q. And then what did you do with the trailer after you turned it over to Mr. Hawkins?

A. We drop trailers over there and they unload them.

Q. That is, by "they", you refer to the Eastman Kodak Company?

A. That is right.

Q. Did you get the pro signed, the waybill that you had at that time?

A. That is right.

Q. By whom did you get it signed?

219 Mr. Callaghan: I object. The waybill is the best evidence, if you have it. Let us see.

The Court: He may state who signed it, if anyone did. By The Witness:

A. Hawkins.

By Mr. Downing:

Q. Mr. Hawkins?

A. Signed it, yes.

Q. Directing your attention to Government's Exhibit 68, marked for identification, I ask you to look at it and ask you if you have seen that exhibit before?

A. This is the seal I found in the back of the trailer, on the floor.

Q. In the back of the trailer, is that the trailer to which you have testified?

A. 1652-K.

Q. When did you find that seal?

A. Before we pulled the trailer away because the dispatcher told me to go see.

Mr. Callaghan: I object to what the dispatcher told him. By Mr. Downing:

Q. Don't tell us what the dispatcher told you. When 220 did you find it in relation to when you talked to the dispatcher?

A. When I went back to look for the seal.

Q. Is this the seal you found at that time?

A. This is the seal.

Q. What did you do with the seal after you found it at that time?

A. Turned it over to Mr. McGrath.

Q. He is the dispatcher?

A. That is right.

Q. You did that on the morning before you pulled the trailer over to the Eastman Kodak Company?

A. That is right.

Q. In what condition was the seal at the time you found it?

A. It was broken.

Q. Was it in the same condition except for being flattened out at the present time?

A. That is right.

Mr. Downing: You may cross examine.

Cross Examination

By Mr. Callaghan:

Q. Did you check, make a list of the articles and things that remained in that truck before you took it over to the Eastman Kodak Company?

A. I hadn't—I just took the trailer over to Eastman.

Q. Please, Mr. Witness, answer yes or no. Did you make any check of the contents of the truck before you took it over to the Eastman Kodak Company?

A. How could I make a check? I didn't know what was missing.

Mr. Callaghan: I move that be stricken.

The Court: It may be stricken. The answer is obviously no. Did you or didn't you?

By Mr. Callaghan:

Q. The question is, did you or didn't you make a check of the contents of that truck?

A. No.

Q. Did you make an inventory of what was found in the truck on the morning of July 11th?

By The Court:

Q. Just answer yes or no, whether you did or you did not.

A. No.

By Mr. Callaghan:

A. As I understand it, this is the first morning that truck came to your attention, was the morning of July 11th, is that right?

A. That is right.

222 Q. You haven't any independent recollection of the seal number that was on this truck, have you?

A. (There was no response.)

Q. You shake your head no. You have got to say yes or no, so the court reporter gets it, Mr. Pellegrino?

A. I know the last number is 4.

Q. The last number is 4?

A. Yes.

Q. Except for the fact that there is attached to this seal which has been handed you for identification a story about that seal, you would not now be able to identify it, would you?

A. Oh, yes, I would, because in the afternoon the agents came in.

Q. Wait a minute. Your answer is you would? If he wants any because you can ask him.

The Court: You can examine him on redirect.

Mr. Downing: I appreciate that.

Mr. Callaghan: That is all.

The Court: Mr. Walsh, any questions?

Cross Examination

By Mr. Walsh:

Q. How many seals did you find?

A. I found one.

223 Q. You say you opened the door and it looked there was some space, is that right?

A. That is right.

Q. The truck was not full?

A. That is right.

Q. About three-quarters full?

A. I imagine so.

Mr. Walsh: That is all.

The Court: Redirect?

Redirect Examination

By Mr. Downing:

Q. It is your best estimate at this time to the extent it was full, is that right, sir?

A. That is right.

Mr. Downing: That is all.

Mr. Callaghan: This is not properly recross. May I ask one question?

The Court: Recross? I forgot about recross. What is it you want to ask?

Mr. Callaghan: It is not properly recross. There is a notation I want you to ask about on this Exhibit 67.

Mr. Downing: That is the one that is already in evidence, the bill of lading. I think he should first de-
224 termine whether or not this man knows anything about the exhibit.

The Court: You may ask the question.

Recross Examination

By Mr. Callaghan:

Q. Did you make any stop offs?

A. No.

Q: On your way over to the Eastman Kodak Company to make any delivery, to the Dearborn Chemical Company?

A. No.

Mr. Callaghan: That is all.

The Court: That is all. You may step down.

(The witness was excused).

The Court: We will take a recess at this time until Thursday morning, at 10:00 o'clock a. m.

(Whereupon, at 4:15 o'clock p. m. an adjournment was taken until Thursday, May 31, 1951, at 10:00 o'clock a. m.)

226 The Clerk: No. 50 CR 641, United States *vs.* Kenneth C. Gordon and Kenneth J. MacLeod.

Mr. Walsh: In connection with the motion previously made here regarding the prejudicial material that appeared in the newspapers, we should like to call your Honor's attention to the article that appeared in the Chicago Daily Tribune yesterday, May 30, 1951, in which the headline states that "Physician Links 2 Defendants To Stolen Film; Bought 20 Rolls from Gang Victim."

Included in the article which pertains to the distortion of Dr. Flick's testimony, there is a statement that, "Swartz was slain in gangland fashion outside his home on May 17, after he had pleaded guilty to possessing some of the stolen film. The Government had expected him to testify in the present trial that he obtained it from the two defendants, Kenneth Gordon, 28, of 515 Roscoe St., and Kenneth MacLeod, 37, of 1150 Lake Shore Dr."

Now, I would like to call your Honor's attention to the fact that the statement as made here as to what the Government expected to prove, and make some inquiry as to the source of these statements.

The Court: What is your motion?

Mr. Walsh: My motion is for a mistrial on the ground that this matter, if it reaches the jury—and they may

have run across it inadvertently—is so prejudicial
227 that we cannot get a fair trial. Further than that,
there is a statement a little different than any we said
so far, that Mr. Downing has been quoted repeatedly in
the papers in other articles that we have filed, and the state-
ment is here that the Government expected Swartz, if he
had lived, to testify against these people.

Now, the source of that information could only come from
the prosecution. That information could only be preju-
dicial to a determination of the issues in this trial, and I
think that some inquiry should be made, or some caution
given to the prosecutor not to indulge in such statements,
and I don't know that he has. I mean, I have had expe-
rience with newspapers being quoted, and sometimes they
draw inferences that are not justified, but I do believe
under any circumstances that the Government should re-
frain from issuing statements, if they have.

The Court: Have you issued any statements to the press?

Mr. Downing: May I make this statement, your Honor?
I have not issued any statements to the press since this
case has gone to trial. Mr. Walsh is not an amateur in
this business, and he has been in the United States Attor-
ney's office. He is well acquainted and is not a babe in
228 the woods, and not naive. He knows I stated in this
court room when there was a motion for increase in
bail, that we had anticipated, and I had asked Judge Igoo
to continue the disposition of the defendant Swartz' case
because of the fact that he was to testify for the Govern-
ment. That is as much as I have ever said to anybody
since that event has taken place.

The Court: You made no statement to the press?

Mr. Downing: I have made no statement.

The Court: The motion is denied.

If you care to write it out, you may file it.

Mr. Walsh: Further than that, I would like to call the
Court's attention, for the record, to a broadcast on Station
WIND radio this morning. I had just woke up, and the
first thing on the radio was a statement by some news-
caster to the effect that the five year old daughter of Mr.
Swartz had died in Detroit, and that although physicians
had placed the cause of her death as respiratory disease,
the police of Detroit and the authorities were going to
make a thorough canvas of the circumstances to determine

whether it was another instance of gangland vengeance.

Swartz was due to testify in the trial of Kenneth McLeod and Kenneth Gordon. There is a completely unrelated situation so far as it can be determined, and I should like to have leave to incorporate a transcript 229 of that broadcast—

The Court: In your written motion?

Mr. Walsh: Yes, your Honor.

The Court: You may do that.

Mr. Walsh: And on that account, I again renew the motion for a mistrial.

The Court: The motion is again denied.

Bring in the jury.

230 Mr. Downing: Mr. McGrath.

— ROBERT MCGRATH, JR., a witness called on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Downing:

Q. Will you state your name, please?

A. Robert McGrath, Jr.

The Court: Is that Mc or Mac?

The Witness: Mc.

By Mr. Downing:

Q. Where do you live?

A. 737 West 26th Street in Chicago.

Q. By whom are you employed, sir?

A. Interstate Motor Freight System.

Q. How long have you been employed by that company?

A. Approximately ten years.

Q. At the present time what are the nature of your duties?

A. City Dispatcher.

Q. And how long have you held that position?

A. Three years.

Q. Briefly, will you explain to the Court and jury what your duties consist of there?

231 A. You dispatch the units from the terminal to customers, and dispatch units to customers for pick up and delivery service.

Q. I now show you two exhibits which have been identified as government's exhibits 68 and 69.

Mr. Callaghan: If your Honor please, may I interrupt just a moment? Attached to each of these exhibits is a slip which I would like to have your Honor examine before they are shown to the witness. They are pasters or slips, which, without me stating their content, ought to be detached before they are shown any witness. They were shown the witness Pellegrino with those things attached.

Mr. Downing: One was shown.

Mr. Callaghan: All right, one was shown.

The Court: Yes, I think so.

Mr. Downing: May we have a stipulation that no question is to be raised with respect to the contents of that information that is on there. The purpose of that, of course, is well known to both the Court and counsel.

The Court: Yes, but I think for use in a trial—

232 Mr. Downing: I appreciate that, but just so we have no dispute as to it.

The Court: As to having detached it?

Mr. Downing: As to the information that was on there, and with respect to the subsequent testimony concerning the custody of those.

The Court: Well, you will hold both of these tags yourself, and if any question is raised, we can do it then, but certainly since his motion and since I have directed you to withdraw, I cannot conceive of the matter being brought up, though you think it might be.

Mr. Downing: May I have just a moment, your Honor?

The Court: Yes, surely.

By Mr. Downing:

Q. I now show you Government's exhibits 68 and 69, both marked for identification, and ask you to look at them, and I ask you if you have seen them?

A. This one, seal 26894, was given to me by Michael Pellegrino, which is one of my city drivers.

Q. On what date was that given to you?

A. On July 11.

Q. And that bears the—

A. Eastman Kodak sign.

233 Q. That bears the tag Government's Exhibit 68 for identification, is that right, sir?

A. That is correct.

Q. And with respect to the other exhibit, Government's Exhibit 69, have you seen that one before?

A. Yes, 26895, was found by—

Mr. Callaghan: Wait a minute. I object to him testifying as to what somebody else found.

The Court: Yes, sustained.

I think the question is, Have you seen that before?

By Mr. Downing:

Q. Have you seen that before?

A. The last time I did see it was together with Agent Higgs.

The Court: Answer Yes or No.

The Witness: Yes, sir.

The Court: Ask another question.

By Mr. Downing:

Q. When did you first see it, as you best recall?

A. On the morning of June 11.

Q. That was back in 1950?

A. 1950.

Q. Where were you when you first saw that exhibit?

A. In the lot of the Interstate Motor Freight System.

234 Q. Who was with you at that time?

A. Agent Higgs.

Q. Is he an agent of the Federal Bureau of Investigation?

A. Federal Bureau of Investigation.

Q. And whereabouts on the lot? You refer to the lot of the Interstate Motor Freight System?

A. Located at 18th and Canal.

Q. That is right here in the City of Chicago?

A. Yes, sir.

Q. And whereabouts on the lot did you find that particular exhibit?

A. On the east end of the lot, on the south side of the pump.

Mr. Callaghan: If your Honor please, I object to that. He has not said he found it any place on the lot, and the question assumes a fact that is not in evidence.

The Court: Will you read the question?

(The question and answer read.)

The Court: Very good. The question and answer may stand.

By Mr. Downing:

Q. On what date, with respect to Government's

235 Exhibit 68, the one you testified you received from Mr. Pellegrino—what date did you receive that from Mr. Pellegrino?

A. On July 11, 1950.

Q. What time of the day, as best you can recall?

A. Approximately between 8 and 8:30 in the morning.

Q. Now, thereafter, after you had both of those two exhibits, what did you do with them?

A. I kept exhibit 68, which is 26894. I had that one, and when Agent Higgs showed up, I gave it to him.

Q. And what, if anything, happened to the other exhibit, government's exhibit 69?

A. That one Agent Higgs found, and he kept that one. Mr. Callaghan: I move that it be stricken, about Agent Higgs finding that one.

The Court: I will let him ask one more question before I pass on that motion.

By Mr. Downing:

Q. Were you present when Agent Higgs found it?

A. Yes, sir.

The Court: Motion denied.

By Mr. Downing:

Q. As you previously testified?

Mr. Callaghan: I move to strike what he previously testified.

The Court: It may be stricken.

By Mr. Downing:

Q. Are you acquainted in your business with Trailer 1652 in the Interstate Motor Freight System?

A. Yes, sir.

Q. Directing your attention to Trailer 1652, I ask you if you, from your own knowledge, know when that trailer was delivered to the consignee, Eastman Kodak Company?

A. On the morning of July 11, 1950.

Q. By whom, if you know, was that delivered?

A. By one of our city drivers, Michael Pellegrino.

Q. And you recall approximately what time of the morning that was?

A. Somewhere around 8:30 and 9 o'clock—somewhere in there.

Mr. Callaghan: A. M.?

The Witness: A. M., yes, sir.

By Mr. Downing:

Q. Was that on the morning of July 11?

A. Yes, sir.

Q. To your knowledge, as the City Dispatcher of the Interstate Motor System, had that freight been officially opened by an employee of the Interstate Motor Freight System subsequent to its arrival in Chicago, and before the morning of July 11th?

A. No, sir.

Mr. Callaghan: That is objected to, whether it was officially unloaded by anybody. Let's have what happened here, without his conclusion about it.

The Court: The objection is overruled, and the answer stand.

Mr. Downing: You may cross examine.

Cross Examination

By Mr. Callaghan:

Q. What time of day was it when you handed—what was the Agent's name?

A. Higgs.

Q. Higgs?

A. Higgs.

Q. When you handed Mr. Higgs exhibit 69?

A. I imagine around 10 in the morning.

Q. What time was it when you handed him exhibit 68?

A. Well, I gave Mr. Higgs one seal, 26894.

Q. You gave him the one that ended with 4?

238 A. Yes, sir.

Q. What was the time of day?

A. I imagine around 10 o'clock, 10 a. m.

Q. You didn't give him the one that ends in 5, did you?

A. No, sir.

Q. When did you first see the seal known as Government's Exhibit 69, that ends in a 5—without reciting the whole number.

A. Mr. Higgs—

Q. When did you first see it, Mr. McGrath?

A. Around 10 o'clock, shortly after 10 o'clock.

Q. That would be how long after the one with the "64" seal was handed to him?

A. An hour and a half or two hours.

Q. An hour and a half or two hours?

A. Yes, sir.

Q. Was the seal ending in 65 handed you by someone else?

A. 65?

Q. The one ending in 65—was that handed you by someone else?

Mr. Downing: Just for the record, I don't think 239 there is any seal ending with 65, Mr. Callaghan. It is "95."

By Mr. Callaghan:

Q. All right, the one ending in 95. It is Government's exhibit.

The Court: Show him the exhibit now.

By Mr. Callaghan:

Q. Government's Exhibit 69—

The Court: Hand him the exhibit you are asking him about.

By The Witness:

A. 69 was not given to me, no, sir.

Mr. Callaghan: 65, Mr. McGrath?

The Court: He is referring to the exhibit number.

By Mr. Callaghan:

Q. Let me get it straight. The one ending 95—

A. That was not given to me.

Q. It was not given you by some other person?

A. No, sir.

Q. Now, do you know when this trailer 1652 stopped at the Dearborn Chemical Company?

A. No, sir, I do not.

Q. Do you know whether or not it did stop at the Dearborn Chemical Company en route to your dock?

240 A. No, sir, Dearborn Chemical and Eastman Kodak—

Q. Do you know, Mr. Witness, whether it did, or not?

A. Yes, I do know that it did not.

Q. Do you know whether it stopped at the Dearborn Chemical Company between your yard at 18th and Canal, and Eastman Kodak Company, at 17th and Indiana Avenue.

A. No, sir, it did not.

Q. Are you familiar with this bill-of-lading which accompanied this bill-of-lading known as Government's exhibit 67?

A. No, sir, I am not.

Q. Have you ever seen it before?

A. Not this particular ticket, no, sir.

Q. Have you seen a carbon copy thereof?

A. No, sir.

Q. Or a duplicate original thereof?

A. No, sir.

Q. In your course of duties as dispatcher for the Interstate Motor Freight Lines, it is part of your duty, is it not, to dispatch the city drivers after the over-the-road men come in with their trucks?

A. That is correct.

Q. And in order to properly dispatch the city drivers, you must have reference to the bill-of-lading that ac-
241 companies the shipment?

A. No, sir.

Q. And do you, under no circumstances, advert or refer to the bill-of-lading?

A. No, sir.

Q. In connection with your dispatching?

A. No, sir.

Q. To whom does the bill-of-lading go in your establishment when the over-the-road man gets to Chicago?

A. The original copy of the bill-of-lading is mailed directly from Eastman Kodak to Eastman Kodak in Chicago. Our Rochester terminal would be given the shipping order copy of the bill-of-lading, and from that we out the freight bill.

Q. That is handed to the driver, the over-the-road freight man, together with some other bills, the freight bill?

A. Yes, sir.

Mr. Callaghan: That is all.

The Court: Do you have any questions?

Mr. Walsh: Yes, your Honor.

Cross Examination

By Mr. Walsh:

Q. Where did you get this knowledge that no stop
242 is made between your plant and Eastman Kodak?

A. With regard to Dearborn Chemical?

Q. Yes.

A. On Eastman Kodak shipments, the enclosures, of which Dearborn Chemical was one, are loaded in the nose of the trailer, and Eastern Kodak is loaded on the back end, and that is delivered first.

Q. Are you talking now about something you know about this shipment, or about most shipments to Eastern Kodak?

A. That is true in all enclosures.

Q. Incidentally, did your driver, Pellegrino, return to you a receipt from the Eastman Kodak Company for the delivery of the trailer?

A. No, sir, he did not.

Q. Well, did he have any document signed when he arrived there, any document that was returned?

Mr. Downing: Objection, your Honor. This is beyond the scope of direct examination.

The Court: All of it has been thus far. The only thing he testified to on direct was receiving one seal and being present when another one was found. All the rest of this is entirely outside the scope of direct.

Mr. Callaghan: If your Honor please, he also testified that Pellegrino delivered the merchandise to the Eastern Kodak and that is as far as he went.

Mr. Walsh: And he knew it.

The Court: I think the objection is well taken. I sustain it.

Mr. Walsh: May I ask him one question on the statement that he knew it was delivered?

The Court: You may.

By Mr. Walsh:

Q. Were you present when Mr. Pellegrino delivered the truck to the Eastman Company?

A. Was I present at the Eastman? No, sir.

Q. Then your knowledge of it comes from what source?

A. I have another driver that works at Eastman Kodak, and he is the one that actually checks the freight off the trailer.

Q. Yes?

A. Well, Pellegrino would deliver the trailer to him.

Q. Would deliver, or did?

A. Did deliver.

Q. Yes, but you weren't there?

A. No, sir, I was not.

Q. Well, how did you learn it?

A. That the trailer was actually delivered?

244 Q. Yes.

A. Well, prior to the time of delivering the trailer, I called Eastman Kodak and asked them to make a special

check of the trailer upon unloading, and later during the course of the day, through other conversations I talked with Eastman Kodak—

Mr. Walsh: I submit his answer was obviously based on hearsay.

Mr. Downing: I object to that. He asked a question and he got an answer.

The Court: Certainly, it may stand.

Mr. Walsh: Well, I move to strike it because it is all hearsay.

The Court: The motion is denied.

By Mr. Walsh:

Q. Now, will you look at Government's exhibit 70 and tell me whether you ever saw that record?

Mr. Downing: Objection. This is beyond the scope of direct examination.

The Court: What is Government's exhibit 70?

Mr. Walsh: It is a trip record.

The Court: Objection sustained.

Mr. Walsh: This, your Honor, also goes to the 245 question of whether he knows it was delivered, because this refers to a trailer not of the Interstate Trailer System, and it is this Kenley thing, and I wanted to get it—

The Court: The ruling will stand.

Mr. Walsh: I am seeking to find out if he can identify the trailer.

The Court: I understand what you are seeking to do, but I think it goes beyond the scope of the direct examination.

By Mr. Walsh:

Q. Who is the Kenley Rex Truck—

Mr. Downing: Objection.

The Court: I didn't hear the question. You interrupted him in the middle of the question.

By Mr. Walsh:

Q. Who is the Kenley Rex Trucking Company?

Mr. Downing: Objection. It is immaterial insofar as it is improper cross examination.

The Court: It goes beyond the scope of the direct, you mean?

Mr. Downing: That's right.

The Court: Sustained.

Mr. Walsh: There is testimony in the record that
246 the trailer bore the name "Kenley Rex."

The Court: By this witness?

Mr. Walsh: No, by other witnesses, and it is that trailer
I am seeking to know if he delivered it to the place, and I
want to see if he knows what he is talking about.

The Court: I sustained the objection.

Mr. Walsh: That is all.

The Court: Any redirect?

Mr. Downing: No, your Honor.

The Court: That is all. You may step down.
(Witness excused.)

247 V. C. CHRISTOFFERSEN, called as a witness here-
in on behalf of the Government, being first duly
sworn, was examined and testified as follows:

Direct Examination

By Mr. Downing:

Q. Will you state your name, please?

A. V. C. Christoffersen.

Q. In what town do you live?

A. Oak Park, Illinois.

Q. By whom are you employed, sir?

A. Interstate Motor Freight System.

Q. How long have you been employed by that company?

A. Ten and a half years.

Q. What is the nature of your present duties with that
company?

A. In present duties, I am terminal auditor.

Q. And directing your attention to July 10 and 11, 1950,
were you employed by the Interstate Motor Freight Sys-
tem?

A. Yes, sir.

Q. What were your duties on that day?

A. I was terminal manager at Chicago.

Q. And will you describe to the court and jury what
248 those duties consisted of?

A. I was in complete charge of the Chicago opera-
tions.

Q. And where was your Chicago terminal located at that
time?

A. 1833 South Canal Street.

Q. Here in the City of Chicago?

A. Chicago, Illinois.

Q. Directing your attention to July 10, 1950, do you recall the name of the watchman if any of the Interstate Motor Freight System?

A. Nick Keyes.

Q. What were his hours of duty at that time?

Mr. Callaghan: I submit, if your Honor please, Mr. Keyes has told us all of that. This is simply repetition. Mr. Keyes testified here.

The Court: What do you want to do, corroborate him?

Mr. Downing: Not only that, but I want to go into it just a little bit more, and I think this is a preliminary question to a couple of other questions which I have.

The Court: You may inquire.

By Mr. Downing:

Q. What were his hours of duty at that time on 249 July 10, as best you recall?

A. From 10:00 p.m. until approximately 7:00 a.m.

Q. Now, on that date, on July 10, 1950, what were the regular office hours of the local employees of the Interstate Motor Freight System employed at the terminal there in Chicago?

A. From 7:00 until about 6:00 p.m.

Q. Between the hours of 6:00 p.m. and 10:00 p.m. was there any watchman on duty at the terminal here in Chicago?

A. No, sir.

Q. In connection with your duties both as terminal manager and in your present duties, are you acquainted with the books and records of the Interstate Motor Freight System?

A. Yes.

Q. Directing your attention to Government's Exhibits 70, 71—you might just hold that—72 and 73, I ask you to look at each of those and ask you if you have seen those before.

A. Yes, sir, I have.

Q. With respect to each of those records, are they records of the Interstate Motor Freight System prepared in the regular course of business?

250 A. Yes, sir, they are.

Q. Was it the regular course of business to prepare such records on or about the date each of them was prepared?

A. Yes, sir.

Q. With respect to Government's Exhibits 72 and 73, the top two here, where were those prepared?

A. They were prepared in Rochester, New York.

Q. Will you describe briefly to the court and jury what Government's Exhibits 72 and 73 are, please?

A. They are copies of our freight bills. One is the delivery receipt which is our record of delivery to the consignee of this particular load.

Q. Is that the one that bears the Government's Exhibit 72 stamp on it?

A. 72, right.

Q. All right. And what with respect to Government's Exhibit 73?

A. Exhibit 73 is what we call the consignee's copy of the same freight bill, which is a copy that is left with the consignee after the shipment is delivered to him.

Q. Were Government's Exhibits 72 and 73 received by your Chicago terminal in the regular course of business?

251 A. Yes, sir, they were.

Q. Was it the regular course of business to receive the documents on or about July 10, 1950?

A. That is right.

Q. With respect to Government's Exhibits 72 marked for identification, I ask you if that was in your custody after it was received in the regular course of business until the time you turned it over to the United States District Court in Detroit, Michigan?

A. That is correct.

Q. With respect to Government's Exhibit 70 marked for identification, I ask you if that was received by the Chicago office in the regular course of business?

A. It was.

Q. Was it the regular course of business to receive such documents on or about the date the document bears?

A. Yes, sir.

Q. Will you describe briefly to the court and jury what that document is?

A. This is what we call our trip record, which is made up at the point of origin of the movement of the truck. It travels with the truck to its destination and has several purposes, of identifying the tractor that pulls the load
252 to Chicago or to its final destination, and this copy is our record in our Chicago office. There are other

copies of this that go in to our main office for cost purposes, and also for payment to the drivers that are handling the loads.

Q. And this copy, Government's Exhibit 70, which you have in front of you, is the copy of the Chicago office, is that right, sir?

A. Correct.

Q. I now direct your attention to Government's Exhibit 71 marked for identification and I ask you in what office that document was prepared.

A. That was prepared in our Chicago office.

Q. And was that document prepared under your jurisdiction and supervision in the regular course of business on or about July 10, 1950?

A. Yes, sir, it was.

Q. Was it the regular course of business to so prepare such documents at or about the date that it was prepared?

A. Yes, sir.

Q. Will you describe briefly to the court and jury what that document represents?

Mr. Callaghan: If your Honor please, Mr. Keyes has told us all about that document, what he had to do with 253 it, and how it came into existence. I submit this is purely repetition.

The Court: Overruled. You may answer.

By Mr. Downing:

Q. Will you explain briefly what that document represents?

A. This is what we call our dispatch record. It is a record of the arrival of all trucks at our Chicago terminal, as well as the departure of all our trucks that leave the terminal each day.

Q. With respect to Government's Exhibit 71, which you have there, and Government's Exhibit 70, what relationship if any is there between Government's Exhibits 70 and 71, and the documents known as Government's Exhibits 72 and 73?

A. This Government's Exhibit 70 is the trip record covering the movement of the load shown on Government's Exhibits 72 and 73 from Rochester to Chicago.

Q. What relationship does Government's Exhibit 71—that is the big sheet here—

A. That shows the arrival time and the trailer number

and tractor number there of the load covered by these other documents.

Mr. Downing: You may cross examine.

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Redirect Examination

By Mr. Downing:

Q. With respect to all the questions that were asked you on cross examination, this trailer that is described in these exhibits as you previously testified, Government's Exhibits 70, 71, 72 and 73; that was received, was it not, at the Chicago terminal of the Interstate Motor Freight 265 System on or about the date and time described in Government's Exhibit 70?

A. Right.

266 Mr. Downing: Mr. Presnell.

WILLIAM PRESNELL, called as a witness herein on behalf of the Government, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Downing:

Q. Will you state your name, please?

A. William Presnell.

Q. In what town do you live?

A. Maywood, Illinois.

Q. By whom are you employed, sir?

A. Interstate Motor Freight System.

Q. How long have you been employed by that company?

A. Sixteen years.

Q. Where are you presently employed?

A. Terminal manager, Chicago.

Q. How long have you been so employed?

A. Since October 1, 1950.

Q. Did you follow, in the tour of your present duties, Mr. Christoffersen?

A. Yes, sir.

267 Q. As terminal manager at the Chicago office of the Interstate Motor Freight System are you acquainted with the records of the Chicago office of the Interstate Motor Freight System?

A. I am.

Q. I direct your attention to Government's Exhibits 70, 71 and 73, each marked for identification, and ask you

to look at those records and state if you have seen them before.

A. I have.

Q. With respect to each of those records, are they records of the Chicago office of the Interstate Motor Freight System?

A. They are.

Q. Are these records maintained under your control and supervision?

A. Yes, sir.

Q. And have they been under your control and supervision since you have been terminal manager until they were turned over to the District Attorney's office?

A. Yes, sir.

Mr. Downing: At this time, if your Honor please, the Government would like to offer in evidence Government's Exhibits 70, 71 and 73.

They may cross examine.

The Court: Do you desire to cross examine?

Mr. Callaghan: I have no cross examination of this witness.

The Court: Do you have any, Mr. Walsh?

Mr. Walsh: No, sir.

The Court: That is all. You may step down.

(Witness excused.)

The Court: Objections, if any, to Government's Exhibits 70, 71, 72 and 73.

Mr. Callaghan: He did not offer 72.

Mr. Downing: I did not offer 72 at this time, your Honor, 70, 71 and 73.

The Court: Very well. Those three.

Mr. Callaghan: If your Honor will hold this exhibit in your hand, I won't have to make any objection other than to say I do object to it because of the label which appears thereon.

The Court: And is it on the basis of that label that you object?

Mr. Callaghan: Made by some person under circumstances which have not been testified to, or identified here. It constitutes written evidence which ought to be given orally from the witness stand in this court and not be permitted to go to the jury in that shape.

The Court: Any other objections?

Mr. Callaghan: That is the principal basis of objection.

The Court: Do you have any objection to this exhibit, Mr. Walsh? Have you seen it?

Mr. Walsh: I haven't seen it, but I will adopt Mr. Callaghan's objection.

The Court: I will rule on that now. We might as well finish one at a time. I mean, if you have any in addition to the ones he voiced, because by our agreement they stand for both.

Mr. Callaghan: The stampings in the upper righthand corner I assume will be obliterated.

The Court: What are they?

Mr. Callaghan: The stampings in the upper righthand corner.

Mr. Downing: So far as they do not obliterate what is on that document, I have no objection.

The Court: Yes. I think you can by heavy crayon obliterate that stamping.

Mr. Callaghan: Yes.

The Court: And that does not in any way--

270 Mr. Downing: I appreciate that, your Honor.

The Court: --detract from the exhibit. Objection to Government's Exhibit 73 is overruled. The same will be received in evidence.

(Said exhibit, so offered and received in evidence, was marked Government's Exhibit 73.)

The Court: Objection, if any, to Government's Exhibits 70 and 71.

Mr. Callaghan: I submit that so far as Government's Exhibit 70 is concerned, no proper foundation has been laid for its introduction, it being handled by the truck driver in this case and bearing notations of that truck driver, and I submit it is not properly identified here for admission in evidence.

The Court: The objections are overruled. Government's Exhibit 70 will be received in evidence.

(Said exhibit, so offered and received in evidence, was marked Government's Exhibit 70.)

The Court: What is the other one?

Mr. Callaghan: My only objection to that document, Government's Exhibit 71, is that we are concerned
271 only with one entry on that document, and I see no

sense in confusing this record and encumbering this record with a lot of documents there. The only entry admissible here is the one testified to by Mr. Keyes concerning that one shipment.

Mr. Downing: I might just add this: Mr. Callaghan, if your Honor recalls, went to great length in cross examination to find out how many were received while Mr. Keyes was on duty, and Mr. Keyes and Mr. Callaghan referred to four or five other items.

Mr. Callaghan: Mr. Keyes said there were four or five others.

Mr. Downing: As to the attachment on the sheet, I do not object to it being removed. As to the balance of Government's Exhibit 71, the face of it—except for that cross examination on the part of Mr. Callaghan, I would normally agree, but I think in the light of his cross examination it is perfectly proper.

The Court: You are removing the second sheet, are you?

Mr. Downing: The second sheet, I do not object to its removal.

272 The Court: Then take that off, or do you want it?

Mr. Walsh: If this is going in, I think the other ought to go in as far as it pertains to this trip, or to this particular load.

The Court: I imagine the jury can read it as well as counsel, and find out which one pertains to what they are considering, and which does not. You think the whole thing ought to go in if any goes in, do you, Mr. Walsh?

Mr. Walsh: Yes.

Mr. Callaghan: I agree with that, that if you let any of it in, let the whole business go in.

The Court: Yes, all right.

Mr. Callaghan: But if you let anything in more than the one having to do with this entry I see no point in that.

Mr. Downing: They can't have their cake and eat it.

The Court: All right. The whole thing is received in evidence.

(Said exhibit so offered and received in evidence, was marked Government's Exhibit 71.)

The Court: We will take our morning recess.

274 THOMAS H. HAWKEN, a witness, called on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Downing:

Q. Will you state your name, please?

A. Thomas H. Hawken.

Q. In what town do you live?

A. At Oak Forest.

Q. In Illinois?

A. Yes, sir.

Q. By whom are you employed, Sir?

A. Eastman Kodak Company.

Q. And how long have you been employed by the Eastman Kodak Company?

A. 31 years.

275 Q. What are the nature of your duties?

A. I am supervisor of receiving of the stock and placement of stock.

Q. And are your employment and your duties performed here in Chicago, in the Chicago branch here in Chicago, Illinois?

A. Yes, sir.

Q. What is the address of the company here in Chicago?

A. 1727 Indiana Avenue.

Q. And were you so employed on July 11, 1950?

A. Yes, sir.

Q. And in connection with your duties, are you acquainted with the receiving records of the Eastman Kodak Company?

A. Yes, sir.

Q. I now show you a document, which is identified as Government Exhibit 72, for identification, and ask you to look at it and ask you if you have ever seen it before?

A. Yes, sir, I have.

Q. Does your handwriting appear on that document?

A. Yes, sir, in the pencil mark.

Q. All the pencil markings thereon, were they placed thereon by you?

276 A. Yes, sir.

Q. And approximately on what date was your writing placed thereon?

A. On July 11.

Q. That was last year, 1950?

A. That is right, in 1950.

Q. Where were you when you placed that writing thereon?

A. At my desk in the receiving department.

Q. And did you place that writing thereon in the regular course of your duties.

A. Yes, sir.

Q. Now, directing your attention to the writing, "494," what does that represent?

A. That is 494 cases, or cases or cartons, received on that trailer.

Q. And you have reference to the trailer that is numbered on that document?

A. That is right, 1652.

Q. Did you make the actual count yourself of the number of cases received?

A. Yes, sir.

Q. And was it in the regular course of your business to so count and make notations on documents similar to this?

277 A. Yes, sir, it was.

Q. And with respect to Government Exhibit 73, I will ask you if that—Government Exhibit 73 in evidence—I will ask you if that is a carbon copy of 72?

A. Yes, sir, that is a carbon copy of the original freight bill.

Q. And with respect to Government Exhibit 73 in evidence, was that written by you for the files of the Eastman Kodak Company?

A. Yes, sir, it was.

Q. What, if anything, did you do with Government Exhibit 72 after it was signed by you?

A. That was given to the driver to take back to Interstate.

Q. At the time the trailer described in Government Exhibit 72 came to the Eastman Kodak Company in Chicago, did you inspect the trailer?

A. Yes, sir, I did. That is in the course of my business.

Q. And after making that inspection, did you then make the notation that is written on the right-hand side of Government Exhibit 72?

A. Yes, sir, in regards to the seals.

Q. And were there any seals on the trailer at that 278 time, Sir?

A. No, sir.

Q. Now, in connection with the trailer which you have had identified as the number on Government Exhibits 72 and 73, were you present when that trailer was unloaded?

A. Yes, sir, I was.

Q. And did you make a record of the contents of the trailer at that time?

A. Yes, sir, I did.

Q. Directing your attention to Government Exhibits 74, 75, 76 and 77, each marked for identification, I ask you to look at those and ask you if you have seen those before?

A. Yes, sir, I have.

Q. With respect to Government Exhibits 74, 75 and 77, by whom were those three exhibits prepared?

A. By myself.

Q. Are they in your handwriting?

A. That is the three, I did.

Q. And what date did you prepare those records?

A. On November 11th.

Q. On what date?

A. November 11th.

Q. Is that the date that appears, on or about the 279 date that appears?

A. About that date or maybe the day before, when we received the consignment from Rochester.

Q. Was that on the date that you see there?

A. Prior to that, Sir.

Q. The date that is stamped on Government exhibit—

A. That is July 11th.

Q. July 11th instead of November 11th, you mean July 11th?

A. If I said November, I am sorry. I mean July 11. I am sorry.

Q. That is when you prepared these three exhibits?

A. That is right.

Q. In connection with what event did you prepare those three exhibits?

A. For our working process of unloading trailers.

Q. And was that in connection with the unloading of trailer 1652?

A. Unloading trailer 1652.

Q. Now, with respect to the other exhibit in that group of exhibits, Exhibit 76, I will ask you, was that exhibit received by you in the regular course of your duties?

A. Yes, sir, it is.

280 Q. Was it the regular course of your duties to receive such documents?

A. That is right.

Q. Was that document in your possession at the time that the trailer 1652 was unloaded?

A. Yes, sir.

Q. Now, at the time you checked in the contents of trailer 1652, did you have knowledge of the quantity, of the type of film to be included in that load?

A. Yes, sir.

Q. And did you receive that knowledge in the regular course of your duties?

A. Yes, sir.

Q. At the time—

Mr. Callaghan: That calls for a conclusion, I submit, if Your Honor please. He should be required to tell how he received that knowledge. It may be pure hearsay.

The Court: The answer may stand.

By Mr. Downing:

Q. At the time you checked in the contents of trailer 1652, were you able to determine the quantity of the goods not received on that shipment by the Eastman Kodak Company at Chicago?

281 A. Yes, sir.

Q. Did you make the list of the type and number of cartons not received?

A. I did, Sir.

Q. With respect to Government Exhibit 74—

A. Yes, sir.

Q. I ask you if that is the list of cartons not received in the said shipment?

Mr. Callaghan: I object.

Mr. Walsh: I object to that.

Mr. Callaghan: It is assuming a negative here. He may prove or testify what was received.

The Court: Well, the other document is the list that was supposed to show what was received.

Mr. Downing: Yes, the other document represents what was received. This is a tabulation.

The Court: His conclusion will be stricken.

Objection sustained.

By Mr. Downing:

Q. Will you identify what Government Exhibit 74 is?

A. Government Exhibit 74 is a list of goods not received in the trailer.

Mr. Callaghan: I move that that be stricken out, if Your Honor please.

282 Your Honor just sustained the objection to a similar question.

The Court: Why don't you bring the other out first?

The answer is stricken.

Mr. Downing: All right.

By Mr. Downing:

Q. With respect to Government Exhibit 77, marked for identification, I will ask you what that document represents.

A. That represents the white sheet of the number of cases received—of not received in trailer 1652.

Q. With respect to Government Exhibit 75, I will ask you what that document represents.

A. That also represents a part of our work sheet of the number of cases received and not received.

Q. And with respect to Government Exhibit 74.

A. 74 is a list of goods not received.

Q. That is based upon your checking records which you had available at that time, is that right?

A. Yes, sir.

Q. Now, with respect to Government Exhibit 76, marked for identification, what relationship, if any, does that have to Government Exhibits 74, 75 and 77?

283 A. That is a list of cases that should have been brought—

Mr. Callaghan: I object to that.

The Court: What did you say?

The Witness: That is a list of cases that should have been brought in for Brulatour.

Mr. Downing: Brulatour.

Mr. Callaghan: Should have been.

Mr. Downing: Should have been.

The Witness: That is part of this Kodak Company.

Mr. Callaghan: If Your Honor please, may I be heard very briefly on that? If they have got a shipping ticket or a bill of lading—

The Court: Where is the record against which they checked?

Mr. Downing: He has the details. This is the record

against which he checked, Your Honor, 76 on this particular type of film; Government Exhibit 76 is what he used.

The Court: Now, that is a record of what was placed in that truck in Rochester?

Mr. Downing: Yes, sir.

That is what Mr. Vayo identified.

284 The Court: That went in there?

Mr. Downing: That went in there, yes, sir, as a part of the shipment.

The Court: It speaks for itself.

The objection is well taken. He is stating a conclusion.

Whether it is not there or not, he can state what was found there, and you also have the list which Mr. Vayo has identified as to what they put in there in Rochester. Of course, the conclusion is that what he did not find there is true. But if he stated what wasn't there, that invades the province of the jury. That is the basis of your objection?

Mr. Callaghan: Yes.

The Court: Let him state what he found on the truck, and you can use his record to do it with.

By Mr. Downing:

Q. Directing your attention to Government Exhibit 76, did you find those cartons that are identified in that exhibit in the truck at that time?

A. No, sir.

Q. And are those—

Mr. Callaghan: Well, he has done the same thing 285 over again.

Mr. Downing: That is a proper question.

The Court: Now, who is going to talk? If you all three talk, I can't hear any one of you.

Mr. Walsh: I should like to object to this form of examination on this basis: Counsel apparently is attempting to show by this man what arrived at the Eastman Kodak Company.

Now, obviously, the man can testify as to what he saw, and not what he could not see.

The Court: He has made a list of it.

Mr. Downing: That is right, Judge.

Mr. Walsh: That is right.

If he has prepared some memorandum from which he can give his testimony, that is all right.

But this document is simply a recapitulation of a conclusion that he has drawn, and counsel is laying a foundation on that.

Mr. Downing: I don't think that there is anything about a conclusion there. He found certain quantities—

The Court: Let him testify.

The conclusion that he did not find what wasn't 286 there is inescapable, anyway.

But I think the objection is well taken, that for him to present a recapitulation more or less invades the province of the jury.

You may put into evidence what was loaded into the truck, the list of the articles that was loaded into the truck in Rochester. This makes up the list of articles that he found when he unloaded the truck in Chicago. A comparison of the two reveals to the jury what was missing.

If you want to go beyond your recapitulation in assuming, that is argument for him to go on and state that that is what was missing.

I will sustain the objection.

Mr. Downing: At the present time there is no detailed list.

Mr. Vayo had a lot of cards; they are a lot of I.B.M. cards, International Business Machines cards, which go to make up the detail, as evidenced by this bill of lading and as evidenced by the waybill.

The Court: Did he use those?

287 Mr. Downing: He used the cards. He used the cards to make up this list, what was put in there and what was received.

The Court: And he has from the same cards made up a list as to what was put in the truck in Rochester?

Mr. Downing: Yes, what was in the truck in Rochester.

The Court: What was in the truck when he unloaded it in Chicago?

Mr. Downing: That is right, Your Honor.

The Court: Very good.

Mr. Downing: But the document that he has there represents the fact that by type and volume of what was not in the load when he received it; in other words, based upon what he found in the load, and based upon his figures.

The Court: Yes. It is to that, that I sustain the objection.

Mr. Downing: After all, this man is the only man who made the check, and there are no other records unless we

are to bring in what are called Fan-fold cards, or International Business Machines cards, that anybody could sit down and compare what was received and what was not in the shipment. He has done the work.

The Court: He has made up that list from those cards? And that is what he has done?

Mr. Downing: Yes.

The Court: No. I am permitting you to go into what was put into the load or in the truck in Rochester and what was taken out of the truck in Chicago.

Mr. Downing: Yes, sir.

The Court: I am not permitting you to make up a list and give to the jury his conclusion.

But he says, here is another list, and by comparing that with another list, that can be deduced by him as well as by you or I. That is the basis of his objection. I mean, that is well taken. You make a negative point of proof here.

Mr. Downing: As I point out to Your Honor—

The Court: The jury understands that it was put in the truck in Rochester and it is not in the truck when it arrived, and it is unloaded in Chicago, it must have been—

Mr. Downing: I am merely—

289 The Court: —lost or got out of there somewhere between the two destinations.

Mr. Downing: I don't want to argue with Your Honor.

But the reasons that I have stressed this point is this: Because under the accounting system of the Eastman Kodak Company, the only lists that are available, other than these groups of cards, which are International Business Machines punch cards, are these lists which this man has.

The Court: And I am permitting the two lists to go in. Now, he has taken those lists from those cards?

Mr. Downing: That is right, plus what he checked.

The Court: It is the third list that I am not permitting.

I think it is clear.

290 By Mr. Downing:

Q: With respect to Government Exhibit 77, marked for identification, will you explain to the Court and jury what the figures on the left-hand column represent?

A. That is the number of cases of the different kinds of goods that should have been in the trailer.

Mr. Walsh: I object to that as being a conclusion.

The Court: No, that may be stricken. If it is what was shown on the bill of lading, or what was loaded in Rochester, let him state that.

By Mr. Downing:

Q. This is the number of cases, according to your records, which were included in the shipment made from Rochester to Eastman Kodak in Chicago?

Mr. Walsh: I object to that unless he shows what record he is relying upon to show it was loaded.

The Court: Overruled. He may answer.

By Mr. Downing:

Q. And do you have the details that support the quantity and type of film, in court?

A. Yes, I have.

Mr. Callaghan: I object to that as calling for a 291 conclusion as to whether he has something that supports something.

The Court: Overruled.

By Mr. Downing:

Q. With respect to the figures on the right-hand side after each item, I ask you what those figures represent.

A. Those are the number of cases we received.

Q. That applies to each of the types, is that correct?

A. Yes, sir.

Q. With respect to the second item from the bottom, Brulatour, the quantity to the left, what does that represent?

Mr. Callaghan: If Your Honor please, we are getting into the same thing again. He is going to give an answer that is going to be objectionable.

The Court: No; he is not, but he is meeting the grounds of your objection.

Overruled.

Mr. Walsh: If Your Honor please, this document, as I understand it, that he is consulting now, is not a record originally, or kept in the course of the company's 292 business. It is a calculation made by him from—

The Court: He has testified it is, that it is his compilation from the other record, made by him, as to the load in Rochester.

Overruled.

By Mr. Downing:

Q. What was the item represented with Brulatour?

A. 39 cases for Brulatour.

Q. With respect to the quantity at the right-hand side?

A. We received 33 cases.

Q. With respect to the cases listed in Government Exhibit 76, I ask you if those are the six cases that were not received by your company.

A. Those are the six cases that were not received.

Mr. Walsh: I object to that.

The Court: Sustained.

By Mr. Downing:

Q. What relationship did those six cases bear to the entry on Government Exhibit 77?

A. Those are the six cases that were stored—

Mr. Callaghan: The same objection.

The Court: The same ruling. It may be stricken.

298 By Mr. Downing:

Q. Directing your attention to Government's Exhibit 76, marked for identification, I ask you from your record was that film, as described therein, loaded in the trailer 1652 in Rochester?

A. Was it loaded?

Q. Yes.

A. That I couldn't say. It was supposed to be in that trailer.

Mr. Callaghan: I move it be stricken.

The Court: It may be stricken.

By Mr. Downing:

Q. According to your information, was there a quantity of film received by you at the time you checked in this load?

A. No.

Q. I show you government's exhibit 1 marked for identification, and ask you to look at that, and also government's exhibits 2, 3, 4, 5 and 65, marked for identification, and I ask you to look at those and I ask you if those cartons were included in the group of cartons received by you in connection with the shipment as evidenced by Government's exhibits.

A. They should have been in the trailer.

Mr. Walsh: I object to that.

The Court: It may be stricken.

By Mr. Downing:

Q. Were they received by you at the time you received the contents of that trailer?

A. No, sir.

Q. With respect to those cartons, or those cases, are those cartons included and listed on government's exhibit 76?

A. Yes, sir.

Mr. Downing: At this time, if your Honor please, the government would like to offer in evidence, Government's exhibits 72, 75, 76, and 77.

The Court: You have taken off that other one?

Mr. Downing: Yes.

The Court: Would you like to cross examine before I rule?

299 Mr. Callaghan: Yes, I would like to cross examine on it.

Cross Examination

By Mr. Callaghan:

Q. Mr. Hawken, Government's exhibit 75 is exclusively in your handwriting, is it not?

A. Yes, sir.

Q. Does the hand of anybody else appear thereon?

A. No, sir.

Q. When did you make that document?

A. On the morning of July 11th.

Q. 1950?

A. 1950.

Q. At your desk?

A. Yes, sir.

Q. Where is your desk with reference to the loading platform?

A. In the Receiving platform, where all of the freight is unloaded.

Q. Where, with reference to the loading platform, is it? Inside of the building?

A. Inside the building.

Q. Were you outside of the building that morning?

A. Yes, sir.

300 Q. When did you last see that document known as Government's exhibit 75, excluding the time you have seen it in court? When, prior to the time you appeared here in court?

A. I would say on Monday, I believe, of this week.

Q. Monday of this week?

A. Yes, sir.

Q. Where?

A. In Mr. Downing's office.

Q. On the 4th floor of this building?

A. Yes, sir.

Q. When, prior to that time, had you seen it?

A. It was in our files in the Eastman Kodak Company--

Q. When?

A. Oh, some time back in September, I believe, of last year, when I took those documents--

Q. In September, 1950?

A. 1950, yes. I wouldn't be sure about that date, because it was the time we went to Detroit.

Q. Then when you were in Mr. Downing's office on Monday of this week, you added some figures to this document, didn't you?

A. No, sir.

301 Q. At no time?

A. No, sir.

Q. All of the figures made were made at the same time?

A. Yes, sir.

Q. On July 11th?

A. On July 11th.

Q. When did you last see these cartons, excluding the time here in court now that Mr. Downing has asked you to look at Government's exhibits 1 to 5, inclusive, and government's exhibit 62?

A. Did I see the cartons?

302 Q. When did you last see the cartons?

A. I saw some of those cartons at Detroit.

Q. You later saw them prior to your appearing on this witness stand at Mr. Downing's office?

A. No, sir, I haven't seen these cartons.

Q. You never saw those cartons in Mr. Downing's office?

A. In Chicago, no, sir.

Q. Sir?

A. No, sir.

Q. And the first time you ever saw those cartons, you say, was in Detroit?

A. In Detroit, yes, sir.

Q. Was that the first time you ever saw them, was in Detroit?

A. Yes, sir.

Q. When did you first see the document which has been identified here as Government Exhibit 76?

A. The morning of July 11th; when they came to me in the mail.

Q. And someone handed them to you at your desk?

A. Yes, sir.

Q. Handed them—you mean it?

A. I got these from the mail, through the mail assistant.

303 Q. Now, when did you first see the document marked here as Government Exhibit 77?

A. I made that up, Sir, from those records.

Q. Is that all exclusively in your handwriting?

A. Yes, sir.

Q. When did you make that, Mr. Hawken?

A. Either—I don't know. I am not quite sure. It might have been the morning before, or on the 10th. It was whenever we received the mail from Rochester. We receive the mail before the shipments come in.

Q. Did you make the document before the trailer or after the trailer got over to your establishment?

A. Before.

Mr. Callaghan: That is all.

The Court: Mr. Walsh?

Mr. Walsh: Yes.

Cross Examination

By Mr. Walsh:

Q. Now, did you examine this trailer when it arrived?

A. Yes, sir.

Q. How many doors have you got?

A. Two doors, rear-door and a side door.

Q. Well, one rear and one side door?

304 A. Yes, sir.

Q. Was either door open when you saw the trailer?

A. The doors were not open. The seals were not on there, Sir.

Q. So you mean there were no seals on there?

A. That's right, Sir.

Q. You never saw any seals on the trailer?

A. No, sir.

Q. In connection with this load?

A. No, sir.

Q. Now, this Government Exhibit 75, is that a record that you make up regularly in the course of your business, every time that a load comes in?

A. No, sir.

Q. That is just a blank sheet of paper with some lines on it, with no form number or anything else on it?

A. No, sir.

Q. It contained some figures that you put on it, and some words?

A. That's right.

Q. And Government Exhibit 76, that is a record that is regularly made and kept in the course of your business?

A. Yes, sir, that was sent me from Rochester, yes, sir.

Q. Now, how about Government Exhibit 77? Do you make one of those up for every trailer?

A. Every trailer, yes, sir.

Q. And you make this up from information sent to you from Rochester?

A. Yes, sir.

Q. Now, do you have the documents which you used in making them up?

A. That's right, Sir.

Q. Let's see those.

A. (Indicating).

Q. Now, did you receive these documents that have been handed me in this envelope?

A. By mail, Sir.

Mr. Downing: Let the record indicate that he is referring to a group of documents handed to Mr. Walsh by Mr. Hawken.

The Court: The record may so show.

Mr. Walsh: Will you mark this as Defendants' Exhibit 4 for identification?

(Document so marked.)

By Mr. Walsh:

Q. Contained in that envelope, do those slips indicate separate orders?

A. Yes, sir, separate orders. You mean from Rochester? Yes, sir.

Q. Now, where is Brulatour's office?

A. Their office was in Chicago, Sir.

Q. At that time?

A. Yes, sir, at that time.

Q. Where, in Chicago?

A. At 1727 Indiana Avenue.

Q. That is your building?

A. Yes, sir.

Q. And did you handle this shipping, as well as Eastman's?

A. Yes, sir.

Q. Well, is the Brulatour a corporation?

A. It is part of Eastman Kodak Company, Sir.

Q. Oh, it is a subsidiary of Eastman Kodak?

A. Yes, sir.

Mr. Downing: I object, Your Honor. I don't think it is material.

The Court: Yes, sustained.

By Mr. Walsh:

Q. Now, how many cases of film did you receive for Brulatour in this shipment?

A. It was three, Sir.

Q. That you got on the truck?

307 A. Yes, sir..

Q. And what did you do with that film?

A. That was delivered to Brulatour, Sir.

Q. It was sent to Brulatour?

A. Yes, sir. I mean delivered to them on their fourth floor storeroom.

Q. And did it remain there, to the best of your knowledge?

A. Until they sold it, Sir, yes, sir.

Q. Until they sold it?

A. That's right, Sir.

Q. And did they sell it?

Mr. Downing: Objection, your Honor. This man wouldn't know.

The Court: Yes, sustained.

308 Mr. Callaghan: We would like to look at these documents, if your Honor please, from which he has drawn some calculations or conclusions. I don't want to take the time of the Court and jury to do it now or during court time. I am willing to do it on recess time.

The Court: Well, have you all of the documents there now?

The Witness: Yes, sir.

By Mr. Walsh:

Q. These are all of the documents from which you made the calculations on the other sheets?

A. That's right.

Q. By "these" are you referring to defendant's exhibit 4?

A. Yes, sir.

The Court: All right; if you have to look it over during the noon hour, I will be glad to let you do that.

May we have this witness back for cross examination at 2?

Mr. Downing: Yes.

The Court: Finish what other items you have now and why don't you check them over during the noon 309 hour?

Mr. Callaghan: I will ask one question.

By Mr. Callaghan:

Q. Was anything on that truck assigned to the Dearborn Chemical Company?

A. There was an enclosure in the front of the trailer.

Q. Was that delivered at the time you delivered the trailer to your establishment?

A. Yes, sir.

Q. Did you check the contents?

A. No, sir.

Mr. Callaghan: That is all.

The Court: Is there any redirect on the cross examination that has occurred? In other words, we will finish with the witness, all except their checking that supporting data.

Mr. Downing: I have just a couple of questions.

The Court: You may ask your redirect now.

Redirect Examination

By Mr. Downing:

Q. In connection with these cartons, Government's exhibits 1 to 5, and Government's exhibit 65, you stated that was in Detroit when you first saw them?

A. Part of them, sir.

310 Q. And by that you mean not all of them were shown to you there?

A. No, sir.

Q. Approximately when was that, as best you can recall?

A. I haven't the correct date, but—

Q. Was it in connection with the appearance before the Federal Court in Detroit, Michigan?

A. Yes, sir, that's right, sir.

Q. Now, you were shown this on cross examination, this Government's exhibit 77, marked for identification. With respect to the quantities appearing on the right of the types, when did you place those quantities thereon?

A. As the trailer was being unloaded.

Q. And so that the quantities to the right of the various items, where there are quantities listed, they were placed thereon as quantities of the truck unloaded, is that right?

A. That's right.

Q. When you answered Mr. Callaghan with respect to the other items that appeared thereon, was that with respect to the truck brought up before?

A. That's right, sir.

Q. And the quantity to the right represents what was received of that particular type, is that right?

A. That's right, sir.

311 Q. Mr. Walsh asked you how many were received of the items for Brulatour. I believe you stated 33, is that correct?

A. 33, right.

Q. And how many, according to your records, on Government's Exhibit 77, based upon information which you had available, would be on that shipment?

Mr. Walsh: I object to that.

The Court: If you ask him how many were shipped—
By Mr. Downing:

Q. How many were shipped according to your records?

A. I didn't quite get the question.

Q. With respect to the entry on here for Brulatour wherein you note there 33 were received, how many were shipped?

A. 39 were shipped.

Mr. Downing: That is all.

The Court: Any recross examination?

Mr. Callaghan: No, your Honor.

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Recross Examination

By Mr. Walsh:

Q. After you had unloaded the trailer, was anything left on it?

Mr. Downing: Just—

By the Witness:

A. Yes, sir.

Mr. Walsh: He has just testified he counted it as it was unloaded.

Mr. Downing: Just a minute, your Honor. May I make this objection? This is certainly not recross examination.

The Court: You asked him how many he unloaded of the Brulatour shipment.

Mr. Downing: Yes, that is all.

The Court: And how many were shipped, and he is asking him if anything else was on the truck after he unloaded it.

Mr. Downing: If he confines it to Brulatour—

The Court: You can bring out what it was.

By Mr. Walsh:

Q. When you took off these 33 for Brulatour was there anything else left?

A. Nothing except the shipment for this chemical concern, sir.

313 Q. And that was a separate shipment?

A. That is right, sir.

Q. And it was still on the trailer?

A. That was still on the trailer, yes, sir.

Mr. Walsh: That is all.

Mr. Downing: That is all.

The Court: Then, with the exception of checking that supporting data, this witness is finished. If you have any questions on cross examination after the exhibits after you have checked that data you may ask those at two o'clock.

319 Q. Your name is Mr. Hawken?

A. Yes.

Q. You are the same Mr. Hawken who was previously sworn and testified this morning in this court room in this matter, is that right?

A. Yes, sir.

Q. Mr. Hawken, I now show you Government's Exhibits 93 and 94.

A. Yes, sir.

The Court: 94 was previously marked—

Mr. Downing: Defendants' Exhibit 4.

The Court: Yes.

By Mr. Downing: ,

Q. I ask you to look at those documents, and I ask you if you recognize those to be documents of Eastman Kodak Company.

A. Yes, sir.

Q. With respect to each of those documents I ask you if those documents were received by you in the regular course of business?

A. Yes.

320 Q. Was it a regular course of your business to receive such documents at the Chicago office of the Eastman Kodak Company?

A. Yes.

Q. With respect to Government's Exhibit 94 marked for identification, will you explain to the court and jury briefly what those documents represent? That is the one in the envelope.

A. Documents in the envelope are the fanfolds, the IBM cards, to cover the shipment from Rochester.

Q. That is the shipment about which you testified this morning?

A. Yes.

Q. With respect to Government's Exhibit 93, the sheet of paper you have in front of you, that represents what?

A. This is a list of the IBM cards as you have the IBM cards in Exhibit 94.

Q. So that Government's Exhibit 93 for identification, would you call that a summary of the IBM cards?

A. Yes.

Q. Those are the IBM cards included in Government's Exhibit 94?

A. That is correct.

321 Q. I direct your attention to Government's Exhibit 93 marked for identification, to the eighth line thereon, and I ask you with respect to the fourth column from the righthand side, on that line, what that column represents.

A. Amount of cases, 116 Verichrome film.

Q. Is that the amount of cases that were listed on here in the shipment in transit as represented on Government's Exhibit 93?

A. Yes, sir.

Q. With respect to the pencil notations appearing on Government's Exhibit 93 marked for identification, immediately following the typewriter printing "V116," what does that represent?

A. That is the actual amount of cases we received.

Q. And the total of these represents—that is, these figures 45, 45, 45 and 12—represents the total number of cases of that type of film received by you at the Eastman plant in Chicago on July 11, 1950, is that correct, sir?

A. Correct, sir.

Q. Have these documents been in your custody since that time, sir?

A. Yes, sir, that is, in our files, not exactly mine—322 the company file.

Q. In the company's file at Chicago?

A. Yes.

Mr. Downing: With respect to Government's Exhibits 93 and 94, the Government would like to offer these in evidence, in addition to the ones heretofore offered.

The Court: Very well. You may cross examine.

Cross Examination

By Mr. Walsh:

Q. For my benefit, and for anybody that is not an office manager, what does "IBM" mean?

A. That is a certain type of method they have of typing up those cards, filled in at the production end of the company.

Q. I will show how smart I am. Doesn't it refer to International Business Machines Company, and isn't that a system of bookkeeping there that the Eastman Kodak Company uses?

A. It could be. I am not aware of that.

Q. And this sheet, as I understand your testimony—

~~Mr.~~ Downing: Government's Exhibit 93.

By Mr. Walsh:

323 Q. —Government's Exhibit 93, contains totals and tabulations from these—

A. Of all those cards.

Q. Of all these business form cards here?

A. Yes, sir.

Q. Are these in any particular order in here?

A. They were, but they are not now, sir.

Mr. Walsh: That is probably my fault. Will you put them in the envelope before you go?

That is all.

Mr. Callaghan: That is all.

(Witness excused.)

Mr. Downing: May we have a ruling?

The Court: Objection, if any, to the Government's Exhibits—you removed the recapitulation, didn't you?

Mr. Downing: Yes.

The Court: What are the exhibit numbers now?

Mr. Downing: Government's Exhibits 75, 76, 77, 72, 93 and 94.

The Court: Any objection?

324 Mr. Callaghan: As to Government's exhibits 93 and 94, the defendant Gordon has no objection.

The Court: Do you have any, Mr. Walsh?

Mr. Walsh: No, your Honor.

The Court: Exhibits 93 and 94 are received in evidence. (Said documents so offered and received in evidence, were marked Government's Exhibits 93 and 94).

Mr. Callaghan: As to Government's exhibit 75, I have the objection that was urged when the evidence that is contained thereon, was offered. It is exactly the thing to which your Honor has consistently and repeatedly sustained objections.

The Court: Well, by removal of the recapitulation, the ground of my ruling sustaining the objection, I think was met. This represents his computations against which the jury can make their own recapitulation, if they want to.

Mr. Callaghan: If you look at the first sheet, you will see what I have reference to there. That is arithmetic about which we have been speaking.

The Court: Do you have any additional objections other than those urged?

Mr. Walsh: No objections other than those urged.

325 The Court: The objections are overruled and Government's exhibits 75 and 76 will be received in evidence.

(Said documents so offered and received in evidence, were marked Government's Exhibits 75 and 76)

The Court: What is that you have in your hand?

Mr. Callaghan: This is 72.

The Court: I thought that was received.

Mr. Downing: No, No. 73 was received. I didn't offer you 72.

Mr. Callaghan: I have the same objection to that as to the previous document, because of the written evidence which is contained on that document.

The Court: Is that the notation in the handwriting of Hawken, you mean?

Mr. Walsh: Yes, sir.

The Court: That was the same objection that you made to the other?

Mr. Callaghan: Yes, your Honor.

The Court: Then I think this stamp should also be obliterated.

Mr. Downing: Yes.

The Court: With that correction, Government's Exhibit 72 will be received in evidence. The objections are overruled.

326 (Said document so offered and received in evidence, was marked Government's Exhibit 72).

The Court: Call your next witness.

JAMES I. MARSHALL, called as a witness on behalf of the Government herein, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Downing:

Q. Will you state your name, please?

A. James I. Marshall.

The Court: James I. —

The Witness: Marshall.

By Mr. Downing:

Q. In what town do you live, Mr. Marshall?

A. Highland Park, Michigan.

Q. What is your business or occupation, sir?

A. I am a jeweler.

Q. And where is your store located?

A. In Ferndale, Michigan.

Q. How long have you been so engaged?

A. About 4 years.

Q. Now, directing your attention to July 20, 1950,
327 did you have occasion to make a trip to Chicago?

A. Yes, sir.

Q. And with whom did you come, if anyone, at that time?

A. Mr. Albert Swartz.

Q. And how did you come from Detroit?

A. We came in my car.

Q. Will you describe your car, at that time?

A. It is a '50 Buick Riviera, a light blue bottom and a dark blue top.

Q. Do you recall the license plates, the numbers, that is, of the license plates?

A. I don't recall right now.

Q. You cannot recall at this time?

A. I cannot recall.

Q. To refresh your recollection, were they 1950 Michigan Em-9645?

A. Yes, I believe that is it.

Q. Now, after reaching Chicago, what did you do?

A. We parked it in a lot, in a parking lot.

Q. Where was the lot?

A. On East Adams.

Q. Is that downtown here in Chicago?

A. Yes, near Wabash.

328 Q. Is that just off Wabash Street on East Adams Street?

A. Yes.

Q. And approximately what time of the day was that, as best you can recall now?

A. About 1:30.

Q. That is in the afternoon, is it?

A. In the afternoon.

Q. Now, after parking your car, what did you do?

A. We went into the jewelry store next to the parking lot.

Q. Do you remember the name of the jewelry store next to the parking lot?

A. Liberal Loan.

Q. That is on East Adams Street, downtown here in Chicago?

A. That's right.

Q. Now, after you went into the Liberal Loan Bank, did Mr. Swartz go in the place of business there with you?

A. Yes, sir.

Q. After you went in there, what did you do?

A. I was introduced to Mr. Gordon.

Q. And do you see Mr. Gordon in the court room at the present time?

329 A. Yes, sir.

Q. Which one is he? Point him out, please.

A. Mr. Gordon is the one in the grey suit (indicating).

Q. That is the second man at counsel's table?

A. Yes, sir.

Mr. Downing: Let the record show that the witness has identified the defendant Kenneth Gordon, if the Court please.

By Mr. Downing:

Q. Who introduced you to the defendant, Kenneth Gordon?

A. Mr. Swartz.

Q. Now, after you were introduced to the defendant Gordon, what took place?

A. Mr. Swartz went in the back room and talked with Mr. Gordon.

Q. In the back room of the store there, is it?

A. Yes, sir.

Q. Approximately how long did the defendant Gordon and Swartz stay in the back room there at that place?

A. A short while.

Q. Then what took place?

A. Then Mr. Swartz and I left.

Q. Keep your voice up.

A. Mr. Swartz and I went to eat.

330 Q. Then what took place?

A. Then we came back to the Liberal Loan Bank, I believe it was.

Q. Then that is the same place where you had met this defendant Gordon, is that right?

A. That's right.

Q. Then what took place after you came back there?

A. Mr. Swartz, Mr. Gordon, and myself left in my car.

Q. Then where did you go?

A. We picked up Mr. Gordon's car.

Q. And where did you pick up Gordon's car?

A. I don't know.

Q. Was it in the immediate vicinity of the jewelry store where you had been?

A. Yes.

Q. Then after that, then what took place?

A. Then we drove to—oh, I don't know, about 15 minutes we drove.

The Court: I cannot hear. Will you speak louder?

The Witness: We drove for about 15 minutes to a garage.

By Mr. Downing:

Q. Do you know where that was located?

A. No, I don't.

331 Q. You don't recall the address of that at the present time?

A. No.

Q. Your answer to that is, "No"?

A. No, sir.

Q. And how did you get to the garage? That is, were you directed to the garage?

A. I followed Mr. Gordon's car.

Q. And then after you reached this garage, what took place?

A. There was a truck in the garage, and someone pulled the truck out of the garage, and I pulled my car into the garage.

Q. And who was present at the time that you pulled your car into the garage?

A. Mr. Swartz, Mr. Gordon, and I believe Mr. MacLeod.

Mr. Walsh: I object to that. He says he believes.

The Court: Ask another question.

By Mr. Downing:

Q. Do you see the person in the court room that you are referring to?

A. I believe Mr. MacLeod.

Mr. Walsh: I object to that and move that it be 332 stricken.

The Court: It may be stricken.

By Mr. Downing:

Q. What is your best recollection as to whether or not the man you refer to as Mr. McLeod, that you refer to, was present at that time.

Mr. Walsh: I object to that question.

The Court: Overruled.

By Mr. Downing:

Q. What is your best recollection with respect to the other man that you saw, whether or not that was Mr. MacLeod?

A. It resembled Mr. MacLeod.

Q. By "Mr. MacLeod" are you referring to—

Mr. Walsh: I move to strike that.

The Court: Denied.

By Mr. Downing:

Q. By "Mr. MacLeod" are you referring to someone in the court room?

A. Yes, sir.

Q. Which one are you referring to?

A. Mr. MacLeod is the man in the grey suit with the blue tie.

Q. Is that the fourth man at the table?

333 A. Yes, sir.

Mr. Downing: Let the record show that the witness has identified the defendant MacLeod.

Mr. Walsh: I object to that. He simply stated that the fourth man is Mr. MacLeod. He didn't identify him.

The Court: The extent to which he identified him is apparent in the record. That is as far as he can go.

By Mr. Downing:

Q. Now, what kind of a truck was this, do you recall, that was pulled out of the garage?

A. Yes, it was an old truck; it was dark, an old make, about '29 or '31, I imagine.

Q. Keep your voice up, Mr. Marshall.

A. And I believe it had the name of "White"—"Charles White" on the side of it.

Q. Who drove that truck out of the garage?

A. I told you I believe it was Mr. MacLeod.

Mr. Walsh: Well, I move to strike that again, your Honor.

The Court: Denied.

By Mr. Downing:

Q. Then what took place after you backed your
334 car into the garage?

A. There was film. There was cases of film stacked up in the garage, and under Mr. Swartz' guidance we proceeded to—

The Court: I cannot hear him.

By Mr. Downing:

Q. Keep your voice up.

A. Under Mr. Swartz' guidance I put some film in my car, filled the back end up and the back of the back seat.

Q. Who else was present at the time that you loaded this film into your car?

A. Mr. Gordon and Mr. MacLeod.

Q. Did either of those two men assist you in the loading of the car?

A. Yes, sir.

Q. One, or both of them, as best you can recall?

A. I believe both of them.

Q. Now, will you describe the type of cartons that you placed in the back of your car at that time and place?

A. They were kodak film cartons, and they were about—oh, one foot by two feet by about twelve inches deep.

Q. And do you recall the color of the carton?

A. It was a greyish carton.

Q. And to your knowledge, was there any listing
335 or record prepared of the type and number of cartons received at that time by you?

A. Yes, sir.

Q. And do you have such a record?

A. I had that record.

Q. And what did you do with that record?

A. I kept it and it was finally turned over to the FBI.

Q. Do you remember the name of the man at the FBI that you turned it over to?

A. Mr. Shearer.

Q. Now, do you recall the type of film that was received by you at that time?

A. Yes, sir, it was 11 cases of 8 millimeter magazine Kodachrome; 10 cases of roll Kodachrome, Cine Kodak.

Q. Ten cases of what?

A. Of roll film, and there was 13 cases of 116 film.

Q. All right. And do you recall after that, after you loaded this film into your car—then what took place?

A. We left Mr. Swartz, and I left for Detroit.

Q. And before you left, did you obtain from either the defendant Gordon, or the defendant MacLeod, any sales slip or invoice for these cartons?

A. No, sir, I didn't.

336 Q. Did you ever see any sales slip or invoices for those cartons?

A. No, sir.

Q. Approximately what time did you leave Chicago for Detroit?

A. I believe it was about 5:30.

Q. And who went with you on your return trip back to Detroit?

A. Mr. Swartz.

Q. And did you take all of the film that you have just testified about receiving here in Chicago?

A. Yes, sir.

Q. And you took that back to Detroit, Michigan, on that date?

A. Yes, sir.

Q. Approximately what time did you arrive back at Detroit?

A. I believe it was about 1:30.

Q. In the morning?

A. In the morning.

Q. Where did you first go after reaching Detroit?

A. I drove Mr. Swartz home.

Q. And at that time what was Mr. Swartz' address?

A. It was 45 or 4039 Sturtevant.

Q. Sturtevant?

A. Yes, sir.

Q. Is that in Detroit?

A. Yes, sir.

Q. At that time, any of the film that was in the car, did Mr. Swartz take any of the film?

A. Yes, sir, he took two cases—two or three cases.

Q. Do you recall the type of film that he took at that time?

A. He took one of the magazines, one case of the roll; and one case of the 116.

Q. Then what did you do after delivering Swartz to his home?

A. Well, it was so late by the time we got home that I kept the film in my car instead of taking it downtown to Mr. Swartz' office, and I went home and I left the film in my car.

Q. And thereafter what did you do with the film?

A. The next morning I took it out to my store.

Q. Directing your attention to Government's exhibit 78, marked for identification, I ask you to look at that and I ask you if you have seen that before?

A. Yes, sir.

Q. From whom did you obtain that document?

337 A. Mr. Swartz gave me this.

Q. When did you obtain it?

A. The day we left Chicago, on the way back to Detroit.

Q. Is that the day about which you just testified, the 20th of July?

A. Yes, sir.

Q. And is that the list of the film that you previously referred to, that you turned over to Agent Shearer of the FBI?

A. Yes, sir.

Q. And in whose writing is the writing in dark ink appearing on the reverse side of that document?

A. That is Mr. Swartz'.

Q. Was that placed there in your presence on or about July 20, 1950?

A. Yes, sir, on the way driving back to Detroit.

Q. Now, with respect to the writing in light ink appearing in the lower left hand corner of the reverse side of that document, by whom was that writing placed there-on?

A. That was my writing.

Q. When did you place that writing on there?

A. 8-25-50.

Q. And in connection with—

338 A. August 25, 1950.

Q. August 25, 1950?

A. Yes, sir.

Q. In connection with what event did you place that on there—that is, your writing?

A. Yes, sir.

Q. Will you explain the purpose for putting your writing on there?

Mr. Walsh: I object to this.

The Witness: This was taken from me on that day.

The Court: Overruled.

By Mr. Downing:

Q. Is that the date, August 25, 1950, the day that you turned it over to Agent Shearer, as you previously testified?

A. Yes, sir.

Q. With respect to the listing in dark on the reverse side of Government's exhibit 78, does that represent quantity of film that was obtained, as you testified?

A. It does.

Q. Will you explain each of those lines, what they represent, the film represented thereby?

A. It was five hundred and fifty rolls of magazine 339 film that I was to sell at \$1.75, one thousand rolls—

Mr. Callaghan: Wait a minute, please. Obviously what is on there is the content of the conversation he had with Mr. Swartz.

Mr. Downing: He can testify what that document represents, your Honor.

Mr. Callaghan: No.

The Court: Let me see the document. Wouldn't you rather have the jury excused?

Mr. Callaghan: Yes, I would, if your Honor please.

The Court: The jury may be excused.

(The following proceedings were had out of the presence and hearing of the jury:)

The Court: Now, you are asking the witness to explain the notations on this card?

Mr. Downing: That's right, your Honor, on the reverse side of the card, in dark ink.

The Court: Yes, and your objection, Mr. Callaghan?

Mr. Callaghan: Well, I think he might possibly testify to the content of what is on this card, that the card bears certain figures, and so on, but he now amplifies what is said on the card and says that this represents five 340 hundred and fifty rolls of something which he was to sell at \$1.75. There is nothing like that on the card at all. He obviously is testifying to something which occurred in a conversation between him and Swartz. All that appears on this card is "550 at \$1.75, 1000 at \$1.50, and 13 boxes of 300 at 25 cents. Al took 100 at \$1.75." Then there is ditto, ditto under "Al took" and "100 at \$1.50."

The Court: Is that also in the handwriting of Swartz, this "Al took"?

Mr. Downing: He identified all of the dark ink writing on the reverse side as Swartz' writing.

The Court: What is your theory as to the admissibility of this which is obviously the agreement between himself and Swartz as to the price at which this is to be sold, if that is what you are getting into.

Mr. Downing: No, the mere purpose—

The Court: It is a conversation.

•Mr. Downing—Not a conversation either, but merely to explain this figure of 550 at \$1.75. In other words, so we will have a better understanding of what the 550 represents, and what the \$1.75 represents, and the type of film.

Mr. Walsh: How did he learn what it meant? He obviously learned it from Mr. Swartz.

341 Mr. Downing: If he has knowledge as to what it is, he was present when the film was loaded, and certainly knows the type of film in the car.

The Court: As to what the 550 represents?

Mr. Downing: That is a quantity.

The Court: That is quantity, obviously. You mean you want him to say as to what part of the shipment in his car the 550 made up?

Mr. Downing: The type of film. In other words, 550—

The Court: Why don't you ask him how many films of each kind he had in his car? I would be inclined to sustain—in fact, I think I have to sustain an objection as to any conversation between him and Swartz outside of the hearing of the defendants. If this conversation was held in the garage and the defendants were present, that is something else again.

Mr. Downing: It is not a conversation I want to have introduced at all. It is merely an explanation of what these figures represent, according to his knowledge.

The Court: Couldn't you get that by direct evidence, by asking him the direct question as to the type of films he had in his car, and if they total up the same number as you say it already comes out?

342 Mr. Downing: He already testified to that.

The Court: The other gets into the possibility of a conversation which is objectionable.

Mr. Downing: The only other point I had in asking the question, your Honor, was also to explain the figures, \$1.75 and \$1.50. Now, the 25 cents is obvious, but the \$1.75 and \$1.50, I think he has a right to explain, if he knows what those figures represent to him.

The Court: Well, his obvious explanation is that Swartz told him those figures.

Mr. Downing: That is not necessarily the basis for his knowledge. If they want to probe what is the basis for his knowledge, they can do that on cross examination.

The Court: Why don't you ask him did he sell any of the stuff himself.

Mr. Downing: Yes.

The Court: Well, you can bring out what he sold for him without getting into the dangerous territory of getting into the conversation with the deceased.

Mr. Downing: It certainly was not my intention to bring in any conversation.

The Court: I don't want error in the record either, if I can help it, and I think you are on dangerous territory.

Guide yourself accordingly. I think the objection thus 343 far is well taken. Bring in the jury.

(Proceedings resumed in the presence and hearing of the jury).

The Court: You may proceed.

By Mr. Downing:

Q. Directing your attention further to Government's exhibit 78, I ask you with respect to the first three lines on the reverse side, the writing on the reverse side, if that represents by line the type of film that you had previously testified to, about which you obtained here in Chicago on July 20, 1950?

A. That was a record that Mr. Swartz gave—

Mr. Walsh: I object to this.

The Court: Sustained. Answer Yes or No.

By Mr. Downing:

Q. Answer Yes or No.

A. Yes, sir.

Q. Now, after the trip about which you testified, on July 20th, did you have occasion to make another trip to Chicago?

A. Yes, sir.

Q. When was that?

A. The next trip was the following Saturday.

The Court: I can't hear.

344 The Witness: The following Saturday.

By Mr. Downing:

Q. Do you recall the day?

A. I believe it was the 22nd.

Q. The 22nd of July?

A. That's right.

Q. And with whom did you come to Chicago on that occasion?

A. With Mr. Swartz.

Q. How did you come to Chicago?

A. In my automobile.

Q. In the same Buick about which you testified?

A. Yes, sir.

Q. Approximately what time did you arrive in Chicago on that date?

A. About 1:30. About the same time, 1:30.

Q. What did you do after arriving here in Chicago on that day?

A. We stopped at the Revere Camera Company.

Q. And thereafter what did you do?

A. After we left the Revere Camera Company, we left a camera to be repaired—we went to the parking lot next to the Liberal Loan Bank.

Q. Is that the same parking lot that you previously referred to?

A. Yes, sir.

345 Q. After parking your car, then what did you do?

A. We parked our car and walked around, and the Liberal Loan Bank was closed, being Saturday, and then we went to eat.

Q. And on that date did you thereafter see the defendant Gordon?

A. Yes, sir.

Q. Approximately what time did you see him on that date?

A. About four-thirty.

Q. And who was with you at that time?

A. Mr. Schwartz.

Q. Where did you see him, as best you recall?

A. I believe it was Division and Michigan, or Division and Lake Shore Drive.

Mr. Callaghan: I can't hear you, Mr. Witness. Keep your voice up.

By The Witness: I am sorry. I believe it was Division and Michigan or Lake Shore Drive.

By Mr. Downing:

Q. Is that on the near north side here just outside the Loop in Chicago here?

A. Yes, sir.

Q. Will you describe what took place when you first saw the defendant Gordon on that date?

A. Mr. Gordon got into his car and drove into an alley right off of that street, and parked.

Q. What did you do? Did you drive in the alley also?

A. Yes, sir, I parked in back of Mr. Gordon.

Q. Was there anyone else present besides you and Mr. Gordon?

A. No, sir.

Q. Was Mr. Schwartz also present at the same time?

A. Yes, sir.

Q. Was he with you?

A. Yes, sir.

Q. After you drove back into this alley, what did you do?

A. Mr. Schwartz got out of the car and went and talked with Mr. Gordon.

Q. Approximately how long did they talk?

A. Five minutes.

Q. Where did they talk, or did you see?

A. Mr. Gordon's car.

Q. All right, and then what took place?

A. Then Mr. Gordon told me to back my car up alongside of a car that was parked in the alley.

Q. Where was this truck parked, do you recall?

347 A. A little driveway that was in the alley.

Q. What type truck was this?

A. It was the same black car I described.

Q. The same black truck you have described?

A. Yes.

Q. Is that the one you had seen on the previous trip to Chicago?

A. Yes, sir.

Q. Then what took place after Mr. Gordon directed you to back your car up alongside this truck?

A. Mr. Gordon and myself put about ten or eleven rolls of film—or cases of film, into my car.

Q. And were the cartons the same type as you previously had seen and taken back to Detroit?

A. Yes, sir.

Q. Were those cartons full or empty cartons?

A. Full cartons.

Q. With respect to July 20th—I forgot to ask you this—back on the July 20th trip were those cartons full or empty cartons?

A. They were all full. We had one sample of a 16 millimeter film.

Q. That was on the 20th?

A. Yes, sir.

348 Q. Back on this second trip were the cartons—
where were the cartons of film obtained from at the
time you loaded them in your Buick on the second trip, July
22?

A. From the truck, back of the truck.

Q. Did anyone else assist in the loading of the film besides the defendant Gordon?

A. No, sir.

Q. In connection with that transaction did you see any sales slip or invoice in connection with that transaction?

A. No, sir.

Mr. Walsh: In regard to the defendant MacLeod I move to strike the testimony regarding the 22d because this witness does not even know a man that would resemble him as being present that day, and the date is not mentioned in the indictment in any way whatsoever.

The Court: Yes. In any event, if there is no further connecting up of the defendant MacLeod an appropriate instruction will be given to the jury at the right time, and I direct you to remind me at the time the jury is instructed. Certainly you are entitled to such an instruction and it will be given.

349 By Mr. Downing:

Q. Mr. Marshall, I now show you Government's Exhibits 79, 80, 81 and 82, purporting to be certain photographs, and I ask you to look at them and ask you if you can identify the location illustrated in each one of those photographs.

A. This is the alley I pulled into on the second trip.

Q. By this you are referring to Government's Exhibit 79, is that right, sir?

A. Yes, sir.

Q. With respect to Government's Exhibit 80?

A. This is a view of the alley.

Q. Is that a view of the same alley?

A. Yes, sir.

Q. All right. With respect to Government's Exhibit
81?

A. This is the same alley.

Q. With respect to Government's Exhibit 82?

A. This is the same T-shaped alley where the truck was parked and I parked my car.

Q. In relation to the space where the car illustrated in this photograph is now shown, where was the truck parked on that date, July 22?

A. On the opposite side.

Q. In the vacant spot there, is that right?

350 A. In the vacant spot.

Q. And where did you pull your car—

A. Alongside—where this car is now parked.

Mr. Walsh: This is Exhibit what?

Mr. Downing: 82.

By Mr. Downing:

Q. And those are the scenes of the location where you secured the film on the second date, is that right, sir?

A. That is.

Q. After the film was in your car on July 22, what next took place?

A. We left for Detroit, Mr. Schwartz and myself.

Q. And what time did you reach Detroit, Michigan?

A. 1:30 in the morning.

Q. And what took place after reaching Detroit?

A. I dropped Mr. Schwartz off and I went home.

Q. And what took place with respect to the film, if anything?

A. I left the film at my house, in front of my house, in the car. I went to sleep after.

Q. Then when did you, if you did, unload the film from your car?

A. The next day, Sunday, I unloaded the film.

Q. That is the same load of film you brought from
351 Chicago and obtained in this alley as you previous testified?

A. Yes, sir.

Q. Thereafter did you have occasion to make another trip to Chicago?

A. Yes, sir.

Q. When did you make the next trip to Chicago?

A. I believe it was Thursday, the 27th, I believe.

Q. 27th of July?

A. Yes, sir, a week from the first trip.

Q. A week from the first trip?

A. Yes.

Q. With whom did you come to Chicago on this trip?

A. With Mr. Schwartz.

Q. How did you come to Chicago at this time?

A. In my Buick.

Q. That is the same Buick you previously described?

A. The same.

Q. Approximately what time did you reach Chicago on this day, as best you can recall?

A. About 11:30.

Q. What did you do after reaching Chicago?

A. I parked in the same parking lot.

Q. That is the one over on East Adams Street?

352 A. Yes.

Q. Next to the Liberal Loan you previously testified about?

A. Yes, sir.

Q. Then after parking your car, what did you do?

A. Pulled—we went into the Liberal Loan Bank.

Q. By “we” you are referring to—

A. Mr. Schwartz and myself.

Q. After going inside the Liberal Loan Bank, whom did you see in that place at that time?

A. Mr. Gordon.

Q. That is the same defendant Gordon you previously have identified here in the court room, is that right?

A. Yes, sir.

Q. Then what took place after you went into the Liberal Loan and saw the defendant Gordon?

A. Mr. Schwartz talked with Mr. Gordon in the back room.

Q. Keep your voice up now. Then after they talked in the back room—approximately how long were they back there?

A. Two or three minutes.

Q. And then what took place?

A. Mr. Schwartz and Mr. Gordon came out and Mr. Gordon gave Mr. Schwartz an address.

353 Q. Was that given to Mr. Schwartz in your presence?

A. Yes, sir.

Q. And then what took place after that happened?

A. Schwartz gave the address to me and said I was driving the car, I would have to know where it was.

Q. Was the defendant Gordon present at that time?

A. Yes, sir.

Q. Was there a conversation about the location of the place in the defendant Gordon's presence?

A. Yes, sir.

Q. Will you tell the court and jury as best you recall what was said with respect to the location?

Mr. Walsh: I object, as far as MacLeod is concerned.

The Court: Yes. The jury will be instructed at the right time that any conversations in the presence of one defendant but not in the presence of the other are to be regarded only against the defendant who was present and not against the other defendant. That instruction will be given in the proper form to you when you are instructed generally.

You will remind me, Mr. Walsh, to give that instruction.

354 By Mr. Downing:

Q. Will you tell us what was said at that time and place?

A. Mr. Gordon told me to take out—the address was on East Erie Street; I believe, 215, it was on there, there was the name Ken.

The Court: The name what?

The Witness: Ken.

By The Witness:

A. I was—that Mr. Schwartz and myself was to see.

By Mr. Downing:

Q. Did he tell you to see the person, Mr. Ken?

Mr. Callaghan: I object to him leading the witness.

The Court: Sustained.

By Mr. Downing:

Q. What else did Mr. Gordon tell you at that time?

A. That is all. We were just supposed to see this fellow named Ken.

Mr. Downing: Mark this Government's Exhibit 83 for identification.

(Said document was marked Government's Exhibit 83 for identification.)

By Mr. Downing:

355 Q. I now show you a document identified as Government's Exhibit 83 marked for identification. I ask you to look at that and I ask you if you have seen it before?

A. Yes, sir.

Q. With respect to those two documents—I am referring to the larger of the two documents in that envelope—when did you first see that document? Keep your voice up.

A. On the 27th of July, 1950.

Q. From whom was that obtained?

A. Mr. Schwartz gave it to me, handed it to me.

Q. And what relationship if any does that document have with respect to the testimony about the note you previously made?

A. This was the address given to me to go on the 27th. This has no relation to the—

Q. Was that document that was given to you on that date as you testified?

A. Yes, sir.

Q. With respect to that document, I ask you if your writing appears thereon?

A. Yes, sir, in the lower left hand corner.

Q. And is that in the light bluish type ink?

356 A. Yes, sir.

Q. When did you place your writing on that document?

A. August 25, 1950.

Q. And after placing your writing thereon, to whom did you give that exhibit?

A. Special Agent Scheer.

Q. He is from the FBI?

A. FBI.

Mr. Callaghan: August 22?

Mr. Downing: August 25.

The Witness: 25.

By Mr. Downing:

Q. With respect to this July 27, 1950, after receiving this note Government's Exhibit 83 which I have just shown you, what did you do?

A. On receiving that note—

Q. Yes, after having that conversation you previously testified to.

A. I drove to that address on Erie.

Q. Who was with you when you drove there?

A. Mr. Schwartz and myself.

Q. Then what did you do at 215 East Erie?

A. I parked my car in the alley and I walked around the front of the street there. There is an apartment

357 building. And I rang the bell, and I asked for Ken, and Mr. MacLeod came to the door and said, "I am Ken." And he walked outside with me.

Q. Is this Mr. MacLeod the one you have identified here in the court room?

A. Yes, sir.

Q. Then what took place after he came outside?

A. We walked around the back, to a garage adjacent to 215 Erie.

Q. Is that in the reverse, in the back part of the premises?

A. It is the next building to 215.

Q. All right. And then is that on an alleyway—

A. Yes.

Q. All right. Then what took place?

A. Mr. MacLeod and myself unpacked or unloaded some cases of film from the truck into the garage. Mr. MacLeod drove the truck out, I backed my car inside the garage.

Q. Had you seen that truck before?

A. Yes, sir.

Q. Was that—

A. The same truck that we—

Q. Is that the same truck that you have seen the 358 other two occasions?

A. Yes, sir.

Q. And who drove the truck out of the garage?

A. Mr. MacLeod.

Q. And Mr. MacLeod and you unloaded some film out of the truck, I believe you testified, is that right?

A. Yes, sir.

Q. Then after that what happened, what took place with respect to—what did you do?

A. I drove my car inside the garage and loaded—Mr. MacLeod and myself loaded my car with the cases of film.

Q. And then what took place?

A. We left, and went back to Detroit.

Mr. Callaghan: Who is "we"?

The Witness: Mr. Schwartz and myself.

By Mr. Downing:

Q. Approximately how much film did you load in your car on that occasion?

A. Approximately 25 cases.

Q. Do you recall the type of cases they were?

A. It was five cases, 100 each, of the 16 millimeter professional color film.

Mr. Walsh: I can't hear you.

359 The Court: Speak louder.

The Witness: Five cases of 100, the 116 color film.

By Mr. Downing:

Q. What was the balance of the film?

A. The rest of it was the roll cine Kodak 8 millimeter film.

Q. I show you Government's Exhibit 1 marked for identification and ask you to look at that, and ask you to look at the contents therein.

A. Yes, sir, that is the professional film.

Q. I ask you if that is the type of professional film you have referred to in your previous answers?

A. Yes, sir.

Q. And there were five cases of this type of film?

A. Yes, 100—there was one missing.

Q. Pardon me?

A. There was one missing, out of one carton.

Q. Do you mean—

A. One roll.

Q. Of the boxes, which are contents, one was missing, is that right?

A. Yes, sir.

Q. Out of one carton?

360 A. Yes.

Q. With respect to the balance, was the balance of the cartons full at that time?

A. Yes, sir.

Q. Does that apply to this other type of film in addition to the 16 millimeter professional?

A. They were all full except for the one.

Q. And it was one carton of professional type where there was one missing, is that right?

A. That is right.

Q. At that time did you receive or see any sales slip or invoice in connection with that transaction?

A. No, sir.

Q. In connection with your unloading of the truck at that particular time as you have testified, were there any cartons of film left on the truck that you could see?

A. Yes, sir.

Q. Approximately how many, as best you can recall, were there left on the truck that you observed at that time?

A. It was a little less than half full.

Q. That is, the truck after it was unloaded was about a little less than half full?

361 A. Yes, sir.

The Court: We will take our afternoon recess at this time. Recess for ten minutes.

(Recess taken.)

The Court: You may proceed.

Mr. Downing: Thank you, your Honor.

By Mr. Downing:

Q. Mr. Marshall, I show you Government's Exhibits 84, 85, 86, 87 and 88, and ask you to look at each of those exhibits, and I ask you if you can identify the location illustrated therein?

A. Yes, sir.

Q. With respect to the location illustrated therein, I ask you where that is.

A. This is the address on 215 East Erie where I took the note—

Q. 215 East Erie?

A. Yes.

Q. With respect to Government's Exhibit 84 I ask you if that is the entrance to which you first went as you previously testified when you reached the address at 215 East Erie.

A. Yes, sir, I parked my car in the alley alongside of—

362 Q. Is that the alley that is illustrated in the photograph?

A. Yes, sir.

Q. With respect to Government's Exhibit 85, I ask you if that also is a front view of the address to which you went?

A. The righthand building is.

Q. With respect to Government's Exhibit 86, I ask you if that is the alley in which you parked your car as you previously have testified.

A. I believe so. I couldn't—

Q. That is your best recollection, is it?

A. Yes, sir. That is not very clear—

Q. That isn't too clear to you, is it?

A. No, sir.

Q. But you parked your car in the alley that is illustrated in Government's Exhibit 84, is that right?

A. Yes, sir.

Q. Now with respect to the location illustrated in Government's Exhibit 87, I ask you if one of the doors indicated therein is where you backed your car in?

A. Yes, sir.

Q. And which door is it?

A. The right door here.

363 Q. That is the double door on the face of the picture, is that right, sir?

A. Yes, sir.

Q. With respect to Government's Exhibit 88 I ask you if that door is also illustrated therein?

A. Yes, sir.

Q. And both of the locations illustrated on the photographs Government's Exhibits 87 and 88, are they the rear of this address that you went to on July 27?

A. This is 215. Here, I don't know the address.

Mr. Walsh: I can't hear.

By Mr. Downing:

Q. The lefthand side is 215?

A. The lefthand side is 215.

Q. And you were not acquainted with the address behind which the garage was located?

A. No, sir.

Q. The garage was adjacent to the 215 building, is that right, sir?

A. That is right.

Q. After you obtained this film on July 27, what did you do after loading the film into your car?

A. Mr. Schwartz and I—and myself—went back to Detroit.

364 Q. Approximately what time did you leave Chicago, do you recall?

A. It was around two, three o'clock. Two, two-thirty.

Q. And with whom were you?

A. Mr. Schwartz and myself.

Q. And did you take the load of film which you obtained in the garage which you have just testified about on that date?

A. Yes, sir.

Q. And where did you take the film to?

A. I went to Mr. Schwartz's home. I dropped off part of the shipment to him, and the rest of it I took out to my store. The store was still open.

Q. Mr. Schwartz's home is the address in Detroit you referred to, is that right?

A. Yes, sir.

Q. Approximately when did you reach Detroit?

A. About eight, eight o'clock.

Q. With respect to this load of film, was that all of the cases, were they all full, that you received on this third trip?

A. All but the one.

Q. As you previously testified. Do you recall approximately how many of the cartons were left with Mr. Schwartz on the third trip, July 27?

A. One case of 16 millimeter commercial film, and one case—I am not exactly sure of the amount; but there were several cases of roll film.

Q. Did you know that there was one case of 16 commercial type, the type of which I showed you, in this carton Government's Exhibit 1?

A. Yes, sir.

Q. And was that a full case?

A. Yes, sir.

Q. And what other type of film did Mr. Schwartz take at that time, or did you leave it at his place?

A. The roll film he took quite a few cases, I don't remember exactly.

Q. That was the 8 millimeter type roll film?

A. Yes.

Q. That was the only other type you had with you on that trip, is that right?

A. On that trip.

Q. You don't recall exactly how much was left with Mr. Schwartz at that time?

A. I don't remember the exact amount.

Q. Then what did you do?

A. I went to my store in Ferndale.

366 Q. And what happened then?

A. It was about eight-thirty, and I had the clerk that works for me to unpack my car and put the film in the basement.

Q. That was on the evening of July 27th?

A. That is Thursday evening.

Q. That was in Ferndale, Michigan?

A. Yes. We were open until nine o'clock.

Q. In connection with the film which you had obtained on these trips, what disposition was made, to whom did any of that film go, to your knowledge?

A. I sold, oh, between ten and fifteen cases.

The Court: You will have to speak louder.

The Witness: I sold between ten and fifteen cases of the film to Mr. Ahee.

The Court: What is that name?

The Witness: Mr. Edmund T. Ahee, of Detroit.

By Mr. Downing:

Q. Spell it.

A. A-h-e-e.

Q. Did any of the film go to anyone else besides Mr. Ahee, that is, the film you brought, to your knowledge?

A. No, there was none.

367 Q. And approximately how much a case did you sell the film to Mr. Ahee—

A. \$1.75 a roll for the 8 millimeter mag—or 8 millimeter roll film, and \$2.00 for the magazine.

Q. That is the 8 millimeter magazine?

A. Yes, sir.

Q. All right.

A. And 20c a roll for the 116, the small rolls.

The Court: What?

The Witness: 116, the small—

By Mr. Downing:

Q. 116 Kodak type?

A. Yes.

Q. How much, what price?

A. That was 20c a roll.

Q. 20c a roll, and you don't recall exactly how much it was that you sold to Mr. Ahee, at this time?

A. At one time I sold him 10 cases of the roll film and quite a few cases of the magazine. I don't remember exactly. And one case of the 116 small Kodak film, and another occasion I sold him two cases of the roll film.

Q. That is the 8 millimeter roll film?

A. 8 millimeter roll film.

Q. To your knowledge did anyone besides Mr. Ahee get any of this particular film you brought back besides
368 Mr. Ahee and Mr. Schwartz?

A. Not to my knowledge.

Q. In connection with the transaction about which you have just testified, have you ever been arrested in connection with that matter?

A. Yes, sir.

Q. When did that take place?

A. On the 28th of July.

Q. Is that the day following this third trip about which you testified?

A. Yes, sir, the next day.

Q. Where were you arrested at that time?

A. In Detroit.

Q. At that time did you turn the film over to any of the Agents of the Federal Bureau of Investigation?

A. Yes, sir, I turned all the rest of the film that I had.

Q. In connection with the charges arising out of such arrest have you entered any plea in the Federal District Court in Detroit?

A. Yes, sir, I pleaded guilty on possession of this film.

Q. And have you been sentenced as yet in connection with that matter?

369 A. No, I haven't.

Q. Upon what date did you turn over the film that you still had on hand to the Agents of the Federal Bureau of Investigation?

A. On the 28th.

Q. I now show you a document identified as Government's Exhibit 89 marked for identification, and ask you to look at it and ask you if you have seen that before.

A. Yes, sir.

Q. And with respect to that document, does your handwriting appear thereon?

A. Yes, it does.

Q. And where does that appear thereon?

A. The bottom.

Q. And are you referring to the signature?

A. Yes, sir.

Q. With your name?

A. Yes, sir.

Q. And upon what date was that affixed to that document, that is, your signature?

A. 7-28-50.

Q. And was that affixed thereto in connection with the turning over to the Agents of the Federal Bureau

370 of Investigation, the cases about which you have just referred to, that is, the Kodak cases?

A. Yes, sir.

Q. And what Agents of the FBI were present that you recall at the time you signed that?

A. Mr. Scheer, Special Agent Scheer, Mr. Shirley.

Q. Shirley?

A. Shirley, and two other Agents.

Q. And whereabouts did you sign that document, not on the paper, but at what location?

A. This was in my store.

Q. In Ferndale, Michigan?

A. In Ferndale.

Q. After signing the document, to whom did you give it, do you recall?

A. I kept one copy and I gave one copy to Mr. Scheer.

Q. And is that the copy that you gave to Mr. Scheer?

A. Yes, sir.

Q. Mr. Witness, I ask you if you will step down and look at these cartons, Government's Exhibits 1 through 85, and I ask you to look at those, if you will, please. Step down, please.

Starting over here to the left, look at those.

A. Yes, sir.

371 Q. Will you resume the stand again, please?

With respect to those exhibits which I have just shown you, Government's Exhibits 1 through 65, inclusive, I ask you if those are the type of cartons which you obtained in Chicago, as you previously testified in your testimony here today?

A. Yes, sir.

Q. I ask you if that is the type of carton that you turned over to the Federal Bureau of Investigation agents on July 28th, as you have just testified to?

A. Yes, sir, those were the commercial film, and that is the—

Q. By "those," you are referring to the cartons with government exhibit stamped 2, 3, 4, 5; is that right, Sir?

A. Yes, sir.

Q. And the same answer applies with the balance of these cartons, is that right, Sir, the type?

A. The ones I have seen.

Q. That is the type of cartons I have just shown you here in the courtroom?

Mr. Downing: At this time, if your Honor please, 372 the Government offers Government Exhibit '89, and they may cross examine.

The Court: I will hear them on the exhibit after cross examination. Have you finished your direct?

Mr. Downing: May I have just a moment, Your Honor?

The Court: All right.

Mr. Downing: They may cross examine.

The Court: Who wants to take the witness first?

Mr. Callaghan: I will examine him in just a moment.

The Court: Very well, Mr. Callaghan, you may proceed.

Cross Examination

By Mr. Callaghan:

Q. How long have you known Mr. Urokie or Ahee, or whatever his name is?

A. For about two years.

Q. What is his business?

A. He is a jeweler in Detroit.

Q. A jeweler?

A. Yes, sir.

373 Q. How long has he been in business there, do you know?

A. For over a year that I know of. He has been selling—

Q. Did you meet him through Schwartz?

A. No, sir.

Q. Now, you came to Chicago with Mr. Schwartz, did you, on each one of these occasions?

A. Yes, sir.

Q. And on the first occasion you came here at Mr. Schwartz's suggestion, didn't you?

A. Yes, sir.

Q. Did you ever ask Mr. Schwartz for a bill of sale or an invoice for this merchandise?

A. No, sir.

Q. You gave Mr. Schwartz the money for it, didn't you?

A. No, sir, I gave him the money I collected on the films, when Mr. Schwartz bought the film.

Q. How much did you turn over in cash to Mr. Schwartz?

A. At one time I turned over \$1,050, and at different times I turned over—let's see. I turned over \$1,050, and another time I turned over some money and I—

The Court: I cannot hear.

Mr. Downing: Keep your voice up.

By the Witness:

374 A. (Continuing) The only amount I remember is \$1,050 that I gave Mr. Schwartz at one time.

By Mr. Callaghan:

Q. Did that involve one sale?

A. Yes, sir.

Q. How much was that sale?

A. That was for the—

Q. No, never mind what it was for. What was the amount of that sale?

A. It was for the film I sold Mr. Ahee.

Q. How much did you get from Mr. Ahee?

A. \$1,050.

Q. Did you keep any for yourself out of the \$1,050?

A. No, sir.

Q. You turned the whole thing over to Mr. Schwartz?

A. Yes, sir.

Q. You later got some other money that you turned over to Schwartz?

A. Yes, sir.

Q. By the way, when did you make the sale to Mr. Ahee?

A. I made that sale on Monday following the Thursday.

Q. That doesn't mean anything to me, "the Monday following the Thursday."

A. The Monday following the 20th.

375 Q. The Monday following the 20th of July?

A. Yes, sir.

Q. And where did that transaction occur, Mr. Marshall?

A. In Mr. Schwartz's office.

Q. In whose office?

A. Mr. Schwartz.

Q. Was the merchandise then in Mr. Schwartz's office?

A. No, the merchandise was in my store.

Q. Did Ahee pay you in cash?

A. Yes, sir.

Q. In Mr. Schwartz's presence?

A. No, sir.

Q. But the transaction took place in Mr. Schwartz's store or office, whichever it may be?

A. The transaction—when I gave Mr. Schwartz some money?

Q. No, when Mr. Ahee paid you, where did that transaction occur?

A. In my store.

Q. In Ferndale?

A. Yes, sir.

Q. Did Ahee at that time take the merchandise that you sold him?

A. Yes, sir.

376 Q. And do you remember now what it was that you sold him?

A. I don't remember the exact amount.

Q. Do you remember what kind of film it was that you sold him?

A. I know there was one case of 116 millimeter.

Q. One case of 116 millimeter?

A. Yes, and there was one case of the 8 millimeter magazine color film, and there was—there were quite a few cases of the 8 millimeter roll film, roll motion picture camera film.

Q. And was that the time that he gave you the \$1,050?

A. Yes, sir.

Q. Did you make a subsequent sale to Ahee of some more of this merchandise?

A. Yes, sir.

Q. What did you sell him at a later time?

A. I sold him two cases of 8 millimeter roll type film, 100 in a case.

Q. What else?

A. That is all.

Q. How much did they give you on that occasion?

A. On that occasion he didn't pay me. He was going to pay me the next day for it.

377 Q. Did he pay you the next day?

A. No sir.

Q. Had you agreed upon a price?

A. Yes, sir.

Q. How much was he to pay you?

A. \$350—I believe that is the amount. It was \$1.75 a roll and there was 200 rolls.

Q. And that is all you gave to him at that time, was the 200 rolls?

A. Yes, sir.

Q. Did you deliver the merchandise on that day?

A. Yes, sir.

Q. Out of your store in Ferndale?

A. No, I was going downtown. Mr. Ahee called me and I said, "Well, I will meet you downtown, and I will leave it in my car, and I will give it to you from my car."

Q. And you met him in Detroit or some place and delivered it to him at Detroit?

A. Yes. He has a store on Broadway—or he had a store on Broadway.

Q. Now, who else did you sell any of this camera film or this film to?

A. That is all.

378 Q. Did you sell any to Dr. Flick?

A. No, sir.

Q. Do you know Dr. Flick?

A. No, sir.

Q. Did you offer it for sale to any other persons?

A. I believe I did.

Q. To how many other persons did you offer it for sale?

A. Offhand, I couldn't say; there were two or three.

Q. Who paid your expenses from Detroit?

A. To Chicago?

Q. Yes.

A. Mr. Schwartz.

Q. On each occasion Mr. Schwartz paid all of your expenses?

A. On the first trip Mr. Schwartz paid my expenses, and on the second trip we split it—I think it was \$10 apiece.

Q. And on the third, then, that included all of your oil and gas and lodging and meals and everything else?

A. Yes, sir.

Q. And who paid the expense of the third trip?

A. We split it.

Q. You split it?

379 A. Yes, sir.

Q. But you never on any occasion kept any of the money you got for this film?

A. No, sir.

Q. How much money did you come over the period of time between July 20th and July 27th—between the period of July 20th to 27th, how much money did you give Schwartz for this film?

A. \$1,050.

Q. How much?

A. \$1,050.

Q. That is all you gave Mr. Schwartz?

A. I believe that was the full amount.

Q. Did you ever pay Schwartz for all of the film that you brought back from Chicago?

A. No, sir.

Q. Did you ever testify any place that you paid Schwartz for all of this film you brought from Chicago?

A. That I paid—no, sir.

Q. Did you during the month of April of 1951 testify at Pontiac, Michigan?

A. Yes, sir.

Mr. Downing: If Your Honor please, I think that 380 this matter—I have no objection, and I think it should be made outside of the presence of the jury.

The Court: The jury may step out, please.

381 (The following proceedings were had out of the presence and hearing of the jury:)

Mr. Downing: My objection, your Honor, to this line of questioning is that I anticipate that examination that Mr. Callaghan is starting to pursue, revolves itself around the testimony of this man that a trial in Pontiac, Michigan, concerning the charge of assault and an attempt to commit murder of one, James Mundo, in which this man was shot in November of 1950.

Now, it seems to me that my understanding is if he opens this door up and wants to try to in any way impeach this man's testimony, I have a right to go into this testimony and what the testimony that was given in connection with what event.

Now, he is opening the door, or seeking to open the door, to this transaction. I have not sought to bring in any of that in. I don't think it is material, but I think if the door is opened that we have a right to go ahead, and we will get into it.

The Court: Well, how far do you intend to go?

Mr. Callaghan: I don't intend to ask him about being shot or shot at or anything else.

The Court: What is it that you intend to ask? Do you have the pages of the transcript? Hand it up.

382 Mr. Callaghan: That one question I intended to ask him now—

The Court: Go ahead.

Mr. Walsh: Maybe we ought to discuss it out of the presence of the witness.

The Court: Probably that would be a good idea. Suppose you step into chambers.

(The following proceedings were had in chambers, out of the presence and hearing of the witness).

Mr. Callaghan: I just asked him whether or not he paid Swartz for this film and he said no, that he only delivered to him \$1,058 that he got from a sale he made to Mr. Ahee, and so on. I said, "Did you purchase this film?" and he said, "No, sir." Now I intend to ask him, "Did you testify on such and such a date in this trial," and so on:

"Q. You bought the film from whom?"

"A. From Al Swartz."

The Court: Is that as far as you intend to go into the transcript? I understand this is a transcript from a proceeding in a state court in Michigan concerning an assault case.

Mr. Callaghan: Yes, involving a shooting by a man named Mundo.

383 Mr. Downing: That's right, in which the man was found guilty and sentenced.

Mr. Callaghan: Now, at the time you say this, "No, I went with Mr. Swartz to get the film." That is in the record already. That I am not concerned with. This is Swartz' invitation.

The Court: This testimony here is not impeaching. That is on page 51 of the transcript. "I went with Mr. Swartz to get the film from Chicago."

Mr. Downing: I don't think this is impeaching either.

The Court: As to whether or not it is impeaching, he has testified here that he sold some of the film to one, Ahee.

Mr. Callaghan: That's right.

The Court: And that he gave the proceeds of that sale to Swartz, as I remember his testimony.

Mr. Callaghan: That's right.

Mr. Downing: That's right.

The Court: Then you asked him the further question as to whether or not he gave Swartz any other money at any time for any film.

Mr. Callaghan: For the purchase of this film.

The Court: And he said No.

Mr. Downing: That's right.

384 Mr. Callaghan: That's right.

The Court: Now, the only other testimony in this transcript that bears on that is this question:

"You bought the film from whom?"

"A. From Al Swartz."

Mr. Callaghan: That's right.

The Court: I don't think that is impeaching.

Mr. Callaghan: I do. He said he didn't buy it from anybody, that he had this film.

The Court: There we get into the legal definition as to what is buying, and he testified here as to the fact,—that is, I assume they are the facts—at least they are the testimony, what he testified are the facts—that he and Swartz brought the film back and that he subsequently sold some of it to Ahee and turned over the proceeds to Swartz in the sum of \$1,050, and he subsequently delivered two other cases at an agreed price, as I remember his testimony, of \$350, but that the price was not paid.

385 Mr. Callaghan: That is right.

Mr. Downing: That is right.

The Court: Now, I don't think this question and answer is impeaching, so I will let you make an offer of proof out of the hearing of the jury, and out of the hearing of the witness, to protect your point. His only answer here is, "From Al Schwartz" to the question, "You bought the film from whom?"

Mr. Downing: That's right.

The Court: Let's see what preceded this examination.

Let the record show that the Court is reading part of the transcript submitted by Mr. Callaghan, on page 49, preceding the question that you referred to, Mr. Callaghan, and the transcript gives the question, "Did you at any time steal any film?"

"Answer: No, sir."

Mr. Eckeles—who is he?

Mr. Callaghan: The attorney for Mr. Mundo.

The Court: Mr. Eckeles made an objection and the court said, "He was accused of possessing the film
386 in his store that was stolen."

"Q. Did you have any film in your possession at any time that you knew was stolen?"

There there was an objection by Eckeles which was sustained.

"Q. You say you have pleaded guilty to this?

"A. Yes, sir.

"Q. You bought the film from whom?

"A. From Al Schwartz."

Well, I would say the questions preceding the particular one that you referred to, Mr. Callaghan, make it all the less impeaching. Apparently what they are trying to bring out here in the examination of the witness was that he was dealing in stolen film, and apparently he was trying to protect himself from that charge, and trying to show how he got the film.

Now, the choice of the verb "you bought the film from whom" is the choice of the examiner, and not the witness. He answers, "From Al Schwartz." I suppose instead of using the verb "bought," if he had said "received," he would have given him the same answer.

387 I don't think that is impeaching, and I would be inclined to sustain the Government's objection.

Is there anything else? Do you want to make your offer of proof on this one now while it is in front of you, so that it is clear? I sustain the Government's objection to your asking him the impeaching question from this part of the transcript which is page 50 of the transcript.

Mr. Callaghan: I will offer to prove, if I were permitted to ask the witness whether or not in the trial of James Mundo at Pontiac, Michigan, during the month of April, 1951, he was asked the question: "You bought the film from whom?" and the witness thereupon answer, "From Al Schwartz"—

The Court: For the reasons indicated, the Government's objection is sustained.

Mr. Callaghan: Now, on page 54 and 55 we may want to get into this: The prosecutor, while he is on the stand, makes the statement, "I would like to show if the Court please, that this man never at any time had any guilty 388 knowledge of the crime to which he pleaded guilty, and what has been brought out is affecting his credibility, and, if he has pleaded guilty to a crime of which The People contend he was not guilty, and which definitely affects his credibility—"

Now, the prosecutor in his presence said that he pleaded guilty to a crime of which he was never guilty, and I want to ask him questions concerning that, and I want to ask him if he heard the prosecutor make the statement.

Mr. Downing: To which I would object.

Mr. Callaghan: While he was on the witness stand, if he heard it made.

The Court: I would sustain the Government's objection to your using this transcript for that purpose.

Mr. Walsh: If it please Your Honor, I would make the same attempt or the same offer on behalf of MacLeod with the further statement that I would like to say that Mr. Downing has now shown that this man pled guilty to the charge of possessing film knowing it to have been 389 stolen, and here was the statement made in his presence while he was under oath in a courtroom in which the prosecutor says, "The People will show that the man did not know that it was stolen, and we will clear him," or words that have been read.

The Court: Well, I sustain the Government's objection to that offer, also.

Mr. Walsh: My point is, if the prosecutor's point came from the witness Marshall—

The Court: Very well, the Government's objection is sustained.

The Court: Well, let your offer be noted.

Mr. Walsh: Further, I would like to call attention to a statement by the Court in the case as a result of all of this.

The Court: I read that. I think it is at the bottom of page 55.

Mr. Walsh: Yes, and that statement was made during the trial while the witness was on the stand.

390 "Let it stand. He pleaded guilty to having stolen property in his possession. He was guilty of possessing stolen property. He was not guilty of knowing it was stolen property at the time."

The Court: This is a Judge of the state court in Michigan.

Mr. Walsh: That's right.

The Court: Who was relieving the Federal Court of its responsibility of determining whether or not it was stolen?

Let it be stipulated and agreed in the presence of the Court that Mr. Callaghan would ask the questions indicated in his offer of proof if I had permitted him to, when he re-enters the court room, to which question you would object?

Mr. Downing: I would object.

The Court: And which objection I will sustain, and the record will show with reference to both defendants—

Mr. Walsh: That's right.

The Court: —that the questions were asked after the offer of proof is made, the Government is to make no point that such question was not asked after the offer of proof was made.

Mr. Downing: That is understood, too, your Honor.

391 The Court: Bring in the jury.

(Proceedings resumed in the court room in the presence and hearing of the jury).

The Court: You may proceed, Mr. Callaghan.

By Mr. Callaghan:

Q. Did you give Swartz any money other than the \$1050 about which you testified?

A. I don't remember, it has been quite a while. I believe that is the only amount.

Q. Well, you would remember, Mr. Witness, would you not, if you had paid Mr. Swartz in addition to the \$1050?

A. No, sir, it has been over a year ago.

Q. Your memory isn't good about all these events?

A. I beg your pardon?

Q. Your memory isn't good about all these events?

A. Yes, sir, certain events. The money, I believe—

Q. Sir?

A. The one amount I remember is \$1050.

Q. The one you remember is \$1050?

A. Yes, sir.

Q. How frequently did you see Swartz between July 20th and July 27th?

A. I seen him Thursday, and I seen him Saturday. I seen him Monday, and I believe I seen him Wednesday.
392 and Thursday.

Q. Did Swartz ever give you anything for the money he got from Dr. Flick?

A. No, sir.

Q. Did Swartz ever give you any money between July 20 and July 27?

A. No, sir, except for the car expenses.

Q. Well, did you just go to Chicago for the ride?

A. No, I went down to Chicago to go to the Revere Camera Company.

Q. That was the second occasion. The third occasion you went to the Revere Camera Company?

A. The first time I went down to go to Revere Camera Company.

Q. Did you come with Swartz on July 20th, just for the ride?

A. No, sir, I came to go to the Revere Camera Company to pick up some cameras.

Q. And that was after you went to the Revere Camera Company that you went to the Adams Street store?

A. No, sir, we got here—we didn't go to the Revere Camera Company. We went to the Liberal Loan Bank first.

Q. By the way, where did you see the name "Liberal Loan Bank?"

393 A. It is either on a window or on the outside of the store.

Q. You are sure you saw that some place, the "Liberal Loan Bank?"

A. Yes, sir. In fact, I have one of the cards at home. Mr. Callaghan: Well, I move that be stricken as a voluntary response of the witness.

The Court: The motion is denied.

By Mr. Callaghan:

Q. Do you have any card in your possession now showing "Liberal Loan Bank" on it?

A. Not in my possession now. I have it in my store.

Q. Did you see the words, "Liberal Loan Bank" on the wall inside?

A. I don't think so.

Q. Who else was present in that store when you went in there on that occasion?

A. There was a white-haired fellow, a salesman.

394 Q. And who else?

A. At that time; that was the first time?

Q. July 20th.

A. That was the only one I remember.

Q. A white haired man who was behind the counter?

A. Yes, sir.

Q. You, Schwartz, and Mr. Gordon—

A. And also the watch salesman.

Q. And a watch salesman?

A. Yes.

Q. And nobody else?

A. I believe there was someone that came in and out while I was there, but I don't remember.

Q. Some customers?

A. Yes, sir.

Q. Now, you sat outside in the store?

A. There is a little chair outside. I sat out there and read the paper.

Q. And Schwartz went into the back room?

A. Yes, sir.

Q. Did the white haired man go back in the back room?

A. No, sir.

Q. Who was in the back room at that time?

A. Mr. Gordon and Mr. Schwartz.

395 Q. Just the two of them?

A. Yes, sir.

Q. Did you go into the back room at all?

A. No, sir—yes, sir, I change that. I did go in the back room.

Q. On the first occasion?

A. Yes, sir.

Q. Now, will you describe that back room to us?

A. All I remember is that I went in the back room to make a telephone call to my aunt.

Q. How big was the back room?

A. About ten feet by fifteen, and it leads into another little room.

Q. Ten feet by fifteen feet. Would you say it was the distance from you to me?

A. Yes, sir.

Q. In one direction, and that would be the ten foot dimension?

A. Yes, sir. And from here down to—

Q. From where I am standing now to where you are standing now for the fifteen foot dimension?

A. It might be just a trifle larger.

Q. A trifle larger than that. Maybe 18 feet by 10 feet?

396 A. Yes, sir.

Q. A distance of where I am standing now to where you are sitting?

A. Yes, sir.

Q. And how is it furnished?

A. I didn't pay much attention. All I remember is that there were desks there.

Q. Did you notice anything else about it at all?

A. No, sir.

Q. Did you notice whether there was a vault back there?

A. No, sir, I didn't pay any attention.

Q. How big was the front or sales room of this jewelry store compared with the back room?

A. The sales space was not too large. I would say about 18 by 18.

Q. 18 by 18?

A. Yes.

Q. Eight feet wide, or eight feet in one dimension larger than the back room?

A. Yes, sir.

Q. You said the back room was 10 by 18?

A. Well, about 15 by 15. It was a little bit—not quite as large as the back room.

397. Q. Where was the cashier's cage in this store, if you noticed, or did you notice the cashier's cage?

A. I believe there was one as you go in, kitty-corner from the door going in.

Q. As you come in the door, directly in front of you?

A. Well, this was counters, counters going around, and I believe the cashier's cage was over there, and there was another counter.

Q. Was that the first time you had ever seen the defendant Gordon?

A. Yes, sir.

Q. Now, were you introduced to him before Schwartz went in the back room, or before he went in the back room?

A. Afterwards.

Q. And as Schwartz went into the back room and was there for several moments and then came out—

A. Yes, sir.

Q. Then for the first time you were introduced to the defendant Gordon?

A. Yes, sir.

Q. Were you introduced to the white haired man?

A. No, sir.

Q. Did you speak to him?

398. A. Yes, sir.

Q. What did you say to him?

A. I don't remember.

Q. Sir?

A. I don't remember, it was—

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Q. What did you say to Gordon on that occasion?

A. It was just an introduction.

Q. Just "How do you do"?

A. Yes, sir.

Q. And you acknowledged the introduction, and that is all?

A. Yes, sir.

Q. Then you left the store?

A. Yes, sir.

Q. Now, your car was parked in a parking garage?

A. Yes, sir.

Q. Near that store?

A. Next door.

Q. Who went to your car with you?

A. Mr. Schwartz.

Q. And who else?

A. And Mr. Gordon came out afterwards, after I got my ticket.

Q. Did Gordon get in the car with you?

399 A. Yes, sir.

Q. And the three of you then drove away in that car?

A. Yes, sir.

Q. Now, when you got up to this garage that you said you had to go to, did you pull through an alley to get to that garage?

A. Yes, sir.

Q. And you were driving all the time?

A. Yes, sir.

Q. And where did Gordon sit?

A. Gordon got in his car, and I followed him.

Q. Gordon didn't ride with you?

A. He rode with me to his car.

Q. Where did you go to get his car?

A. I don't remember the exact street.

Q. How far from this Adams Street store?

A. Oh, about ten blocks.

Q. Which direction? Do you know your directions in Chicago?

A. North.

Q. And Gordon's car was parked there in a garage, or in a parking lot—which?

A. Well, it was parked on a side street.

Q. At a curb?

400 A. Yes, sir.

Q. On a street?

A. Yes, sir.

Q. And then Gordon got out of your car and at a point—

A. Yes, sir.

Q. And you followed him from there?

A. Yes, sir.

Q. To an alley where you turned in an alley and went to a garage?

A. That's right.

Q. When you got to this garage, it was Schwartz, wasn't it, who selected the film that was to go in the car?

A. Yes, sir.

Q. And Schwartz directed you to a certain film?

A. No, they had it piled up, and I just loaded it into the car.

Q. Schwartz told you what he wanted loaded?

A. Well, Mr. Gordon and Mr. Schwartz already had the film piled into a pile.

Q. Mr. Witness, you said in your direct examination, "When we got to the garage, and when we got there you took a number of boxes and piled them up and put it in the car.

A. He had it piled up and told me to put it in the 401 car.

Q. He had it piled up and told you to put it in the car?

A. Yes, sir.

Q. Did anyone assist you in putting it in the car?

A. I thought it was Mr. MacLeod.

Q. You are not sure about that?

A. No, sir.

Q. But some other person and you put the rolls of film into your car that Schwartz designated for you to put in the car?

A. Yes, sir.

Q. Do you know how many cartons or boxes you put into the car at that time?

A. It was eleven cartons of the magazine film, ten cartons of roll film, and thirteen cartons of the 116 millimeter film.

Q. That is a total of how many cartons?

A. 34.

Q. Were they placed in the trunk, or the back of the car?

A. Both.

Q. Now, how long did you remain in Chicago that day?

A. We left and went back to Detroit—I believe we left around 4:30 or 5:30.

Q. You left Chicago at 4:30 or 5:30?

A. Yes, sir.

Q. It was well on to 1:30 or 2 o'clock in the morning when you got to Detroit?

A. Yes, sir.

Q. You went first to Schwartz's home at Sturdivant Avenue?

A. Yes, sir, we stopped and had dinner.

Q. How much of the film did you take off at Schwartz's house?

A. Mr. Schwartz, I believe, took one case each.

Q. One case of each of the three different kinds?

A. Of each of the three different kinds.

Q. That you have described?

A. That's right.

Q. Did he give you any money for it?

A. No, sir.

Q. And you took the rest of the cases then and drove to Ferndale?

A. Yes, sir.

Q. And you took them down to your store?

A. Yes, sir.

Q. And you put them in your basement at 2 o'clock in the morning?

A. Yes, sir—oh, no, no, sir. I didn't take them out. I went first, and went to sleep.

Q. Where did you live in Detroit?

A. 200 Pilgrim, in Highland Park.

Q. You drove to 200 Pilgrim in Highland Park and left the merchandise in your automobile, if I understand you correctly?

A. That's right.

Q. When was it you took it to your store?

A. The next morning.

Q. When did you make the sale to Ahee?

A. Friday.

Q. The Friday following this trip to Chicago?

A. Yes, sir.

Q. And the merchandise you sold to Mr. Ahee was merchandise from this first trip?

A. Yes, sir.

Q. How many cases did you sell to Ahee?

A. I sold him one case of the 116, and I believe it was nine or ten cases of the roll, and I am not sure about the magazine.

Q. You are not sure of what else you may have sold him?

A. No, sir.

404 Q. Was that the occasion on which you say he gave you \$1,050?

A. Yes, sir.

Q. In cash?

A. Mr. Ahee had a check, and asked me to cash it, and I couldn't cash it. I believe it was for \$1,800.

Q. But he paid you in cash?

A. Yes, sir.

Q. Did you ask that he pay you in cash?

A. No, sir.

Q. Now, prior to your entering a plea of guilty in Detroit, you had a conversation with Mr. Scheer of the FBI, didn't you?

A. Yes, sir, the 28th when I was picked up—

Q. Keep your voice up.

A. I talked to Mr. Scheer of the FBI on the 28th, the day I was picked up.

405 Q. Where did Mr. Scheer first see you?

Mr. Downing: I object, unless he knows when he first saw him. Obviously Mr. Scheer is the best witness as to where he first saw Mr. Marshall. As to where Mr. Marshall first saw Mr. Scheer, that is another question and to that I do not have any objection.

The Court: That is what he intended, I think.

Mr. Callaghan: I think we understand each other. We are all talking about the same day.

By Mr. Callaghan:

Q. Where was it Scheer first saw you or you first saw Scheer on the occasion he came to see you about something?

A. On Woodward Avenue in Detroit.

Q. In your store?

A. No, sir.

Q. Where?

A. On Woodward Avenue.

Q. What is on Woodward Avenue?

A. I had a car parked on Woodward Avenue.

Q. Mr. Scheer came over to your car?

A. Yes, sir, and asked me what I had in my car in the back.

406 Q. And then did he take you to the office of the FBI?

A. I am not sure whether he took me downtown first or whether he took me out to the store.

Q. By downtown do you mean to the police department?

A. The Post Office, Federal Building, Detroit.

Q. And did he sit you down there and question you?

A. He asked me where I got the film.

Q. Did you make a statement at that time?

A. Yes, sir.

Q. In writing?

A. Yes, sir.

Mr. Callaghan: Do you have that statement, Mr. Downing?

Mr. Downing: I don't have it in court, no.

By Mr. Callaghan:

Q. How long did he question you?

A. About an hour.

Q. Was any other Agent present at the time that he questioned you?

A. Yes; sir.

Q. Who else was present?

A. I am not sure. I believe it was Mr. Shirley.

Q. Shirley?

A. Yes, sir. I wouldn't say for sure. I am not
407 positive.

Q. Did you after you had been questioned for an hour or an hour and a half sign a statement then for them?

A. I believe I did.

Q. Was it in question-and-answer form or was it in a narrative form?

A. Narrative form.

Mr. Callaghan: Does the Government have that statement? I am asking now for its production.

Mr. Downing: If your Honor please, first of all I think it is immaterial as to whether we have the statement. There is not anything on direct examination—

By The Court: What is before me? Is anyone asking me for anything?

Mr. Callaghan: I am asking that the court compel the Government to produce that statement.

The Court: Your motion is denied.

Mr. Walsh: Or a copy of it if he has it.

The Court: You have to make a request so I can rule on it. You make yours. What do you want?

Mr. Walsh: Defendant MacLeod requests an examination of that statement about which the witness has testified. 408

The Court: That request is likewise denied.

IN THE UNITED STATES DISTRICT COURT

(Caption—No. 50 CR 641)

Before Judge Campbell and a Jury,

Friday, June 1, 1951,

10:00 o'clock, a.m.

Court met pursuant to adjournment.

411 (Whereupon the following proceedings were had in chambers out of the presence and hearing of the jury:)

Mr. Callaghan: If your Honor please, yesterday there came into the testimony reference to a visit this witness made to Chicago on July 22nd.

No offense is charged in this indictment as of July 22. It got in very swiftly. He covered the July 22 incident in about two pages, and no objection was made to it, I state frankly, at the time it came in.

But I now move to strike that evidence having to do with the offense or the matter about which he testified on July 22, on the ground that it is not charge in the indictment and is not material to the questions that are involved in this lawsuit. We are concerned here with what happened on July 20, being counts 1 and 2 in the indictment, and July 27, as charged in counts 3 and 4. July 22 is an offense not charged:

The Court: In other words, there are two trips charged in the indictment and you, Mr. Downing, introduced evidence of a third?

Mr. Downing: Yes, in accordance with the law of the Seventh Circuit, where crimes of similar type may be shown as to the question of intent.

The Court: Very well. The motion is denied.

412 Mr. Callaghan: Will your Honor, in view of that ruling, now charge the jury that they are not to consider the matter having to do with the occurrence on July 22 as proof of a substantive offense as charged in the indictment, that they are to consider that evidence with respect to July 22 solely on the question of motive or intent, that it must be considered by the jury for no other purpose.

The Court: I think I will consider that if you will submit an appropriate instruction at the time I instruct the jury generally, I will give it consideration at that time. I

will not instruct them at this time, but I direct you to prepare such an instruction and submit it with your other instructions at the time all the instructions are submitted.

Mr. Callaghan: I think that point—

The Court: As the time I also have to instruct—

Mr. Callaghan: That point is terribly important to Mr. Walsh's client because he was not even concerned with this July 22 incident.

The Court: I did give an instruction yesterday as to his client with reference to anything that occurred out of his presence. I gave that instruction twice yesterday, and I will give it again in the general instructions at the end of the case. I directed Mr. Wash to be sure to remind me at that time, and to submit an appropriate instruction, and you are again so directed and you will also submit one, Mr. Callaghan.

Mr. Callaghan: Yes.

The Court: Did you have something else, Mr. Walsh?

Mr. Walsh: No, sir.

(Whereupon the following proceedings were had in open court, in the presence and hearing of the jury:)

The Court: Let the witness take the stand.

JAMES I. MARSHALL, a witness heretofore called on behalf of the Government, and having been heretofore first duly sworn, resumed the stand and further testified as follows:

Cross Examination (Ctd.)

By Mr. Callaghan:

Q. You are the same James Marshall who was testifying at the adjournment yesterday?

A. Yes, sir.

Q. Mr. Marshall, how many statements did you make to the FBI after your detention on July 28?

Mr. Downing: If your Honor please, I object. I think that is immaterial. This man is not a defendant.

414 The Court: Yes. Unless there is some special reason for it, I don't think there is any necessity for it.

Mr. Callaghan: I first want to find out how many statements he made, and then I propose to ask him certain questions concerning those statements.

The Court: The objection is sustained.

By Mr. Callaghan:

Q. After you made your first statement on July 22 when were you next brought into the office of the FBI?

A. I don't remember right now.

Q. How long after July 28 was it before you were again brought in to the FBI?

A. I believe August 25th when I gave the material to the—

Q. Speak up.

A. I believe it was August 25.

Q. Was that after your plea in Detroit or before?

A. After.

Q. You appeared before Judge Levin in Detroit on or about August 14, did you not; and at that time entered a plea of guilty?

A. Yes, sir.

415 Q. Did I say August 14th? I mean August 18th.

A. I wasn't sure of the date.

Q. You appeared there with your counsel, Mr. Schwartz?

A. Yes, sir.

Q. And the Government was represented by Mr. Kenneth Smith?

A. Yes, sir.

Q. Was Mr. Scheer present?

Mr. Downing: Objection, your Honor. It is immaterial whether Mr. Scheer or anybody else was present.

The Court: What is it you want to bring out?

Mr. Callaghan: I propose to show out of this witness the hope and promise of immunity and all of those things that are connected with it.

The Court: You may ask him a question, if he was promised any. I sustain objection to this question.

By Mr. Callaghan:

Q. Prior to going into that court room had Mr. Scheer promised you any immunity for your testimony which you were to give in any later proceedings in this matter?

A. No, there was never any promise.

Q. Had Mr. Schwartz communicated to you any 416 promise that had been given him by Mr. Scheer or by the United States Attorney in Detroit?

A. There was no promise.

Q. Do you know whether Mr. Smith made any promises to your counsel?

A. Not that I know of.

Q. Did Mr. Schwartz communicate any such promise to you?

A. No, he did not.

Q. Do you hope by your testimony here to get off easy in your case in Detroit?

A. No, sir.

Q. You have no hope of that at all?

A. No, sir.

Q. And you are not just trying to do the best for yourself here on the witness stand, are you?

A. No, sir.

Q. At the time you entered your plea of guilty in Detroit, were you advised in open court at that time that your counsel and Mr. Smith had been in chambers and discussed the disposition of your case with the judge?

Mr. Downing: If your Honor please, I think that is immaterial.

417) Mr. Callaghan: I will prove it.

Mr. Downing: Just a minute, your Honor.

Mr. Callaghan: Now, your Honor—

The Court: Finish your objection.

Mr. Downing: It is immaterial. This man cannot be held responsible for anything that may have transpired between a judge in the Federal District Court in Detroit and Mr. Smith, not in this man's presence, and it is immaterial.

Mr. Callaghan: I propose to show that at the time he entered his plea of guilty in the court in Detroit there was considerable—

Mr. Callaghan: I object unless this is outside the presence of the jury.

The Court: Yes. The jury will step out, please.

(Whereupon the following proceedings were had out of the presence and hearing of the jury:)

The Court: What is it you propose to show?

Mr. Callaghan: I propose to show, if your Honor please—I would like to have the witness excluded from the court room.

The Court: The witness will step out.

(Whereupon the following proceedings were had out of the presence and hearing of the witness:)

418 Mr. Callaghan: I propose to show that on August 18th in the District Court of the United States for the Eastern District of Michigan, before the Honorable Theodore Levin, District Judge, this defendant appeared and at that time waived the filing of an indictment or the return of an indictment, and signed a document consenting to being charged by information, that the court at that time explained to him the nature of the proceeding, that he could insist upon the return of an indictment, but that he waived

examination and return of an indictment, consenting to acceptance of prosecution by information; that at that time he entered a plea of guilty, but insisted to the court over that plea that he still was not guilty. He was then asked by the court whether anyone had promised him anything, to which he responded, "No," that he had not been forced to plead guilty. That thereupon in open court the District Judge said to this defendant—and I say this is the basis for part of his motive for testifying:

419. "The Court: Very well, the plea of guilty is accepted. Now, I am going to refer your case to the Probation Department for presentence report. I think I should say to you, as I said to your lawyer yesterday when he and Mr. Smith called upon me in chambers yesterday morning, that it seemed to me that if you intended to plead guilty and expected a recommendation for a lenient sentence or for probation from the Probation Department, that it would be essential that you satisfy the Probation Department that you have given the law enforcement authorities all the information concerning the merchandise involved in this proceeding."

The sword of Damocles is now being held over his head, and I want to show that.

Mr. Downing: I object to that.

Mr. Callaghan:

"As I understand it, there was a tremendous amount of film involved,"

and so on.

420 "and it is very important for the law enforcement authorities to apprehend all of those who participated in this rather large theft from the interstate commerce shipment.

"I am not holding out any promises to you, but I think you would be well advised to tell the probation authorities the whole story even though it might involve others.

"The Defendant: Yes, sir. I told Mr. Sherry everything I knew, and I tried to be very cooperative."

"The Court: The bond is \$2500 which has been furnished, and it may be continued."

I want to show that is what happened in that court that morning.

Mr. Downing: First of all, I do not think what this judge said to this man in any way is material to this matter here. He is not responsible for what the judge voluntarily suggests to him or in any way tells him to do. Obviously, he was not present at the session which is referred to in the chambers of the court. He cannot be held responsible for that. If the judge says this, this and this, 421 I don't think this man is in any way affected by what the judge tells him to do. I think it is immaterial here. This man is not a defendant.

422 Mr. Walsh: May I be heard briefly?

The Court: Yes, surely.

Mr. Walsh: It appears to me that Mr. Downing approaches this as a question of responsibility on the part of the witness. I don't think it is important at all. The question is the motive the witness has in testifying, and what may be going through his mind as he testifies, and the jury is entitled to know it, as well as the Court is entitled to know it. The question is whether or not this man has a motive that is prejudicial to these persons. The jury is to judge that. If he is hoping for a reward, we are entitled to know that.

The Court: I permitted Mr. Callaghan to ask him several questions on that, even to the one question which might have been objectionable, the last one, if he is here without hoping for anything himself. All of those questions directed to this witness I permitted Mr. Callaghan to ask. This further colloquy between counsel and the Court in Detroit, I think, is thoroughly immaterial, and I sustain the objection.

Mr. Callaghan: Judge, I propose to ask the witness a direct question as to whether or not he was told by the District Judge that if he expected any leniency in this proceeding, he better cooperate with the law enforcement 423 authorities.

The Court: I would sustain the objection to that.

Mr. Callaghan: May I ask the question in the presence and hearing of the jury?

The Court: I will permit the record to show that you are asking the question and the Government will not be permitted to make a point of the fact that no—

Mr. Callaghan: Your Honor forbids me now to ask that question in the presence of the jury?

The Court: I do, and I have sustained the Government's objection.

Mr. Walsh: I think Mr. Callaghan understands that he is to ask the question.

Mr. Callaghan: No, no.

The Court: He is not to ask the question. He is forbidden. The same applies to you, if there are any doubts in his mind. You are joining in this motion?

Mr. Walsh: Yes.

The Court: Qui facit per alium, et cetera.

Bring in the witness, and bring in the jury.

(Proceedings resumed in the presence and hearing of the jury.)

The Court: You may proceed.

By Mr. Callaghan:

424 Q. When did you last discuss your testimony with Mr. Downing, the prosecutor in this case?

A. I believe it was about a week or ten days ago.

Q. You didn't discuss it with him yesterday at all?

A. No, sir. There might have been one or two things I might have discussed.

Q. "Yes, sir, no, sir, might have been one or two things"—now, which is it?

A. The entire testimony, no, sir.

Q. How long were you with Mr. Downing yesterday before you took the witness stand?

A. Three or four minutes.

Q. Where?

A. In Mr. Downing's office.

Q. What time of day was it?

A. I believe it was around 11 o'clock.

Q. 11 o'clock yesterday morning?

A. I believe it was.

Q. Who else was present?

A. Mr. Scheer.

Q. Mr. Scheer from the FBI in Detroit?

A. Yes, sir.

Q. Who else?

A. I don't know his name. (indicating).

Mr. Downing: He is referring to Mr. Pringle.

425 By Mr. Callaghan:

Q. Mr. Pringle of the United States Marshal's office?

A. Yes, sir.

Q. And who else?

A. And two other men.

Q. Do you see those two other men in the court room?

A. Yes, sir, there is one there (indicating).

Q. One man there. Which man do you indicate?

A. The fellow with the light brown suit.

Mr. Callaghan: This gentleman, what is your name?

Mr. Downing: He is indicating Mr. Boyajin.

By Mr. Callaghan:

Q. He is an agent of the Federal Bureau of Investigation, is he?

A. I don't know.

Mr. Downing: I will stipulate that he is.

Mr. Callaghan: May the record show that he is an agent of the Federal Bureau of Investigation?

Mr. Downing: Sure.

By Mr. Callaghan:

Q. And who else?

A. One other gentleman. He is not here.

Q. That you do not see in the court room?

426 A. Yes, sir.

Q. Was Mr. Mehegan present?

A. I don't know. He came in, but I don't know whether he was there during the—

Q. What do you mean by that, "He came in, but I don't know if he was there"?

A. I was in the room for an hour.

Q. You were not there 3 or 4 minutes?

A. I was there for an hour.

Q. Was Mr. McCormick with you there?

A. Mr. McCormick came in and went out.

Q. How long was Mr. McCormick there?

A. 5 or 10 minutes.

Q. Now, have you named all of the people who were there?

A. To the best of my ability.

Q. Now, when you left this court room yesterday, you again went to the United States Attorney's office, didn't you?

A. No, sir.

Q. Were you in the United States Attorney's office at all last evening after you left this witness stand?

A. No, sir.

Q. Were you there this morning?

427 A. Yes, sir.

Q. Did you see Mr. Downing this morning?

A. Yes, sir.

Q. Did you talk to Mr. Downing this morning?

A. Yes, sir.

Q. Were all of those same men present when you again talked to Mr. Downing?

A. No, sir.

Q. Did you say "No, sir" or "Yes, sir"?

A. No, sir.

Q. How many persons were present when you talked to Mr. Downing this morning?

A. There was one other man—I believe there was 2 FBI men and one other man from the county, or—

Mr. Downing: The United States Marshal's office.

The Witness: The United States Marshal's office.

By Mr. Callaghan:

Q. Did you discuss the testimony you had given yesterday?

A. No, sir.

Q. Did you discuss the testimony that you might give today?

A. No, sir.

428 Q. Did you discuss then the questions that might be asked you and the answers you might make to those questions?

A. No, sir.

Q. You weren't told to anticipate any questions on cross examination then by Mr. Downing or anybody else?

A. There might have been one or two questions.

Q. What were the one or two questions, do your remember?

A. I don't know. Mr. Downing told me just to say what I knew.

Q. What were the one or two questions you discussed?

A. Oh, there was one with regard to the amount of money that was transacted and I said I didn't remember.

Q. What else did he ask you about?

A. And the other was something in connection with Mr. Swartz being killed.

Q. And what else did he talk to you about?

A. That was all, I believe.

Q. Now, how long were you in Mr. Downing's office?

A. 10 or 15 minutes.

Q. And just those two questions or two matters were talked about in the 10 or 15 minutes?

A. Yes, sir.

Q. Now, did Mr. Downing tell you that if you testified favorably in this case that he would suggest to the Probation Department in Detroit, Michigan that you would receive favorable consideration?

A. No, sir.

Q. Did anybody in the United States Attorney's office in Chicago make that suggestion to you?

A. I said previously that had no connection.

Q. Just answer my question.

A. No, sir.

Q. Did Mr. Mehegan or Mr. McCormick say anything like that to you?

A. No, sir.

Q. And you have no hope of immunity or reward for the testimony you are now giving in this court room?

A. No, sir.

Q. Did any person whomsoever suggest to you that if you cooperated with the authorities in this case and testified against others, you would receive consideration?

Mr. Downing: I object, your Honor. This has been gone into before.

The Court: He may answer.

By The Witness:

A. No, sir, my lawyer told me not to testify.

430 Mr. Callaghan: I move that the last part be stricken, as to what his lawyer told him. We are not concerned with that, and it would not be admissible under any circumstances, and it is purely a voluntary response of the witness.

The Court: The motion is denied.

By Mr. Callaghan:

Q. Your lawyer, Mr. Schwartz, told you not to testify?

A. Yes, sir.

Q. Now, did you tell the District Judge in Detroit, after you entered your plea of guilty, that you were not guilty?

A. I told him I was not guilty of receiving stolen property with the knowledge it was stolen.

Q. You didn't transport any film to Detroit with the belief that film was stolen, did you?

A. No, sir.

Q. Now, in the first statement you made to Mr. Scheer, you didn't name Kenneth Gordon, did you?

A. No, sir.

Q. And you didn't name Mr. MacLeod in that statement, did you?

A. I don't believe so.

431 Mr. Callaghan: Now, I ask again for the production of that statement, if your Honor please.

The Court: The motion is denied.

By Mr. Callaghan:

Q. That statement that you made in Detroit to Mr. Scheer when you were arrested in August or July of 1950, was wholly inconsistent with your testimony given in this lawsuit, wasn't it?

A. I—

Q. Just answer that Yes or No, if you can?

A. No, sir.

Q. It was not inconsistent?

A. It was consistent.

Q. It was consistent with the testimony you have given here?

A. Yes.

Q. But you didn't name Gordon, and you didn't name MacLeod? Did you?

A. There wasn't anybody—

Q. Wait a minute. You didn't name Gordon, and you didn't name MacLeod, did you?

A. No, sir.

Q. Now, how long after this first statement you made in July, was it before you ever mentioned the name of Gordon or MacLeod to anybody?

432 A. August 25th.

Q. August 25 of 1950? That is a month and a week after?

A. Yes, sir.

Q. And that was after you had entered your plea in Detroit, wasn't it?

Q. Now, you said on your first statement, Mr. Witness, didn't you, that you got this film from Mr. Swartz?

A. Yes, sir.

Q. You said in your first statement that you purchased it from Swartz, didn't you?

A. Mr. Swartz did all the buying.

Q. Wait a minute. You said in your first statement that you purchased it from Swartz, didn't you?

A. I don't remember.

Q. That was rather an important event in your life, wasn't it, the making of that statement?

Mr. Downing: I object to the observation.

The Court: Sustained.

Mr. Callaghan: Wasn't it, I said.

Mr. Downing: Objection.

The Court: The objection is sustained.

433 By Mr. Callaghan:

Q. Well, was it an every day occurrence for you to make statements to the FBI?

A. After July 28th.

Q. After July 28th it was an every day occurrence?

A. Well, I mean I made quite a few statements.

Q. How many statement did you make?

A. I don't remember exactly.

Q. Ten?

A. No, sir.

Q. Fewer than ten, or more than ten?

A. Fewer.

Q. How many fewer?

A. Four or five, six.

Q. Four or five fewer, or you made four or five statements?

A. Four or five statements.

Q. And you signed each one of those statements, didn't you?

A. Yes, sir.

Q. And each one of those statements varied, didn't it?

A. Slightly.

Q. Each time you told the story you added something to it?

A. There was something I remembered.

434 Q. Each time you added something to the statement?

A. I said there was something I remembered.

Q. Mr. Witness, each time you made the statement you added something to it?

Mr. Downing: I object, because the question has been asked twice and—

The Court: What do you want to observe, Mr. Callaghan?

Mr. Callaghan: I want to observe that I want a Yes or No answer to that question.

The Court: The question has been answered. The objection is sustained.

By Mr. Callaghan:

Q. Did you sign all of those statements?

Mr. Downing: Objection. This is repetition.

The Court: Sustained.

By Mr. Callaghan:

Q. To whom did you give the statement?

A. To the FBI.

Q. To Mr. Scheer, or Mr. Sherley?

A. Yes, one of the two.

Mr. Callaghan: I ask for the production of these statements, each one of which the witness says varied in some particular.

435 The Court: The motion is denied.

Mr. Walsh: The defendant MacLeod asks for an inspection of the statements too.

The Court: Likewise denied.

By Mr. Callaghan:

Q. Between July 18 and August 25, you made five statements in writing, and signed each one, is that right?

A. I told you, I believe so.

Q. I didn't hear you?

A. I believe so.

Q. And it wasn't until August 25 that you ever mentioned the name of Gordon or MacLeod?

A. That is correct.

Q. Now, the only person involved in this entire proceeding to whom you ever gave any money was Swartz, is that so?

A. That's right.

Q. How much did you make out of it?

A. I didn't make anything.

Q. How much did you hope to make out of it?

A. Three or four hundred dollars.

Q. You were selling it on consignment basis, were you?

A. Yes, sir.

436 Q. Now, you didn't put up a quarter for this merchandise with Mr. Swartz?

A. I gave Mr. Swartz some money, but I don't remember the amount.

Q. How much did you give Mr. Swartz in addition to the \$1050 that you gave him when you sold the film to Mr. Ahee?

A. I don't remember.

Q. Well, was it several hundred dollars, or was it \$40?

A. I don't remember.

Q. You can't remember now whether it was several hundred or \$40?

A. No, sir.

Q. Or \$10?

A. I told you I don't remember.

Q. Sir.

A. I do not remember.

Q. When did you give that money to Swartz?

A. I still don't remember.

Q. How much did you have in your pocket when you came to Chicago on July 20th?

Mr. Downing: Objection, your Honor. That is immaterial, how much he had in his pocket on July 20th.

437 The Court: He may answer, if he remembers.

By The Witness:

A. I had about \$600 or \$700, I believe.

By Mr. Callaghan:

Q. \$600 or \$700?

A. Yes.

Q. Did you give that to Swartz?

A. I don't believe so. I might have given him around \$300.

Q. Your memory is better about it now?

A. No, sir.

Q. Than it was a minute or two ago?

A. No, sir.

Q. How much did you have in your pocket when you came to Chicago on July 27th?

A. I had about \$30.

Q. Did you give any of that to Swartz?

A. No, sir, I paid for the expenses.

Q. Now, you were to make some additional moneys out of it when you sold the merchandise? You were to turn the money over to Swartz, as you sold it?

A. Yes.

Q. And you were to get from Swartz some of the proceeds?

A. Yes, sir, we were splitting the profits.

438 Q. Now, when you made this sale to Mr. Ahee, did you tell him it was your merchandise?

A. I didn't. There was no mention of it being my merchandise.

Q. Did you call Mr. Ahee, or did he call you?

A. I believe I met Mr. Ahee downtown.

Q. Do I say it wrong? Is it "Ayhee" rather than "Ahee"?

A. Yes, sir.

Q. You met Mr. Ahee downtown?

A. Yes, sir.

Q. What did you say to him?

A. I asked him if he could use any film. He asked me for the price and I gave him the price.

Q. Did he ask you where you got it?

A. No, sir.

Q. Did you tell him where you got it?

A. No, sir.

Q. Did you tell him you were selling it to him at a bargain price?

A. He knew it was a bargain price.

Q. Did you tell him that it was Swartz merchandise?

A. No, sir.

Q. Did you give him a bill of sale when you sold it to him?

439 A. No, sir.

Q. Prior to July 20th of 1950, had you ever done any business with Mr. Swartz?

A. Yes, sir.

Q. What kind of business had you done with Mr. Swartz?

A. I had gotten things off of Mr. Swartz. I have a charge account with Mr. Swartz.

Q. What had you bought with Mr. Swartz prior to July 20th?

Mr. Downing: Objection. That is immaterial and has nothing to do with the relevancy of this lawsuit.

The Court: Sustained.

By Mr. Callaghan:

Q. On how many occasions had you had business transactions with Mr. Swartz?

Mr. Downing: Objection, your Honor. It is immaterial to this lawsuit.

The Court: Sustained.

By Mr. Callaghan:

Q. How long had you known Mr. Swartz?

A. About three years.

Mr. Callaghan: If your Honor please, I respectfully submit that this man having been an associate of Mr. 440 Swartz for a matter of three years, that I am entitled to develop all of the matters in connection with that association to show the motive of this witness for testifying and the interest in the outcome of the litigation, and also to test his credibility.

The Court: Your objection may be noted, and it is overruled.

By Mr. Callaghan:

Q. You are not a defendant in this proceeding?

A. No, sir.

Q. The only proceeding in which you were a defendant was in Detroit, Michigan?

A. That's right, sir.

Q. And it is over 9 months now that your plea in Detroit has been pending, and is undisposed of, and you have not been sentenced in that, have you?

A. No, sir.

Q. And there is not even a date-set for your sentence, is there?

A. I don't believe so.

Q. Now, when did you last see this statement that you made to Scheer on July 28th?

A. I don't remember seeing it since July 28th.

441 Q. Pardon me, have you finished?

A. Since July 28—

Q. You have not seen it since July 28th?

A. I don't believe so.

Q. You are sure about that?

A. Almost positive.

Q. When, since July 28th, have you seen the other 4 or 5 statements that you made in this matter?

A. I never received any of the statements.

Q. Did you get copies of the statements that you made?

A. No, sir.

Q. Have they been shown you by anybody since you made them?

A. I don't believe so.

Q. When did you last see the statements that you made on August 25?

A. I don't remember. I don't remember seeing it.

Q. Would you say that you did not see it after August 25?

A. I did not see it.

Q. You did not see it after August 25?

A. I did not.

Q. Now, you came to Chicago in November of 1950, didn't you, Mr. Witness?

442 A. November—what was that?

Q. November of 1950?

A. I don't believe so.

Q. Well, when, after July 27th of 1950, were you again in Chicago?

(No response.)

Mr. Callaghan: May I have a drink of water?

By The Witness:

A. I was here. It might have been in November. I don't remember the exact date.

Q. Did your counsel accompany you on that trip?

A. I believe it was November.

Q. Do you want a drink, Mr. Marshall?

A. Yes, sir.

By The Witness:

A. It might have been November.

Q. You may have been here in November, 1950?

A. Yes, sir.

Q. Did you talk to Mr. Downing at that time?

A. I believe I did.

Q. Did you see your statements at that time?

A. No, sir.

Mr. Callaghan: May I see this list that this witness is supposed to have given to Mr. Scheer?

443 Mr. Downing: I will give you the list that Mr. Marshall gave to Mr. Scheer.

Mr. Callaghan: That Mr. Marshall said—

The Witness: I gave that to him.

The Court: You know, I might grant the motion, but since there was only colloquy—

Mr. Callaghan: I submit the witness has no part in that colloquy. !

The Court: Neither should you or Mr. Downing have had.

Mr. Callaghan: Well, I will plead to that.

The Court: I will sentence you after this trial is over, and Mr. Downing, too.

By Mr. Callaghan:

Q. Now, when you got home on July 20th, did you count the cases before you put them into your store?

A. On July 20th I left my car overnight.

Q. All right, on the 21st, when you put them into your car, did you then count the cases?

A. Yes, sir.

Q. How many cases did you have?

A. There was—

Q. Just how many?

Mr. Downing: Let him answer.

444 By The Witness:

A. Thirty-two.

By Mr. Callaghan:

Q. When you got home on July 27, did you count the cases that you took out of your car?

A. I believe I did.

445 Q. Do you know how many cases you had at that time?

A. Nine or ten.

Q. Nine or ten?

A. Somewhere around there.

Q. Sir?

A. It was right around there, I don't remember the exact amount.

Q. How many cases did you have when you left Chicago?

A. I believe it was the same amount.

Q. Nine or ten?

A. Yes, sir.

Q. When you got to your home you still had nine or ten?

A. Yes, sir.

Q. On the 27th before you went out to your home—in Ferndale, is that right?

A. No, I live in Highland Park.

Q. Your store is in Ferndale?

A. Yes.

Mr. Downing: July 27?

Mr. Callaghan: Yes.

By Mr. Callaghan:

Q. You stopped at Swartz's house, didn't you?

A. On the way back?

Q. Sir?

446 A. On the way back from Chicago?

Q. Yes.

A. Yes, sir.

Q. Do you remember, what was the make-up of those nine or ten cases that you took out of Chicago on July 27?

A. I believe they were eight.

Q. You are sure now, by the way, you only took nine or ten at that time?

A. I don't remember the exact amount.

Q. Was it nine or was it ten?

A. I don't remember the exact amount.

Q. What is your best estimate of the exact amount?

A. Nine or ten.

Q. Either nine or ten?

A. Yes.

Q. What were those nine or ten cases made up of, what kind of film?

A. 8 millimeter roll type, cine Kodak Kodachrome.

Q. Is that all you took back from Chicago on July 27?

A. Are you talking about the 27th or this Saturday, the
22d?

Q. July 27, I am talking about.

A. No, sir, I took about thirty, around twenty-seven cases.

447 Q. All of my questions, in case we misunderstood each other, each of the last eight or ten questions has been dedicated to July 27.

A. Then there was a mistake.

Q. How many cases did you put into your home on July 27, I will ask you again?

A. In my home, none.

Q. Or in your store, speaking now, of July 27 or the day after.

A. Around 16, I believe.

Q. Sir?

A. Sixteen.

Q. Sixteen cases?

A. Somewhere around there.

Q. When prior to July, 1950, had you been in Chicago?

Mr. Downing: Objection, I think prior to July—

Mr. Callaghan: I promise your Honor it is not just a question.

The Court: When prior?

Mr. Callaghan: When prior to July, 1950, had he been in Chicago?

Mr. Downing: I think it is immaterial here. The date of the indictment is July 20—

448 The Court: What is it you want to bring out prior to the charges in the indictment?

Mr. Callaghan: I have a very definite reason for it.

The Court: I will permit him to answer one question to see what your next one will be.

The Witness: I believe it was about a month before I went to Revere Camera Company.

By Mr. Callaghan:

Q. How frequently had you been in Chicago prior to July, 1950?

A. I usually come down three, four, five times a year.

Q. But so far as driving conditions are concerned and street locations are concerned, you are a comparative stranger to Chicago, are you not?

A. My aunt lives in Chicago, I know the town fairly well.

Q. I don't care about your aunt.

Mr. Downing: Just a minute:

Mr. Callaghan: I move to strike that out.

The Court: Motion denied. The answer will stand.

By Mr. Callaghan:

Q. Will you answer the question I have asked, and
449 forget about your aunt?

Mr. Downing: I submit—

By the Witness:

A. I know north and south.

The Court: What did you say?

Mr. Downing: I submit the answer has already been made to the question.

The Court: I sustain you.

By Mr. Callaghan:

Q. You are familiar with the streets of Chicago, are you?

A. Some streets.

Q. And various locations, various streets?

A. Yes, sir, some streets.

Q. How many hundred north is Chicago Avenue?

A. That I don't know. I have only been—

Q. How many hundred north is Division Street?

A. Division runs east and west, I believe.

Q. How many hundred north is it, do you know?

Mr. Downing: Objection.

By the Witness:

A. I would say around 1100.

By Mr. Callaghan:

Q. How many hundred west is Jefferson?

450 Mr. Downing: Objection.

By the Witness:

A. I don't know where Jefferson is at.

The Court: Objection sustained. I think you have gone far enough to test his knowledge of the streets in Chicago.

451 By Mr. Callaghan:

Q. Mr. Witness, will you look at Government's Exhibit 83 for identification and tell me when you first saw that document?

A. July 27.

Q. July 27?

A. Yes, sir.

Q. At Chicago?

A. Yes, sir.

Q. In whose possession was it when you first saw it?

452 A. Mr. Gordon gave it to Mr. Swartz. Mr. Swartz gave it to me.

Mr. Callaghan: I move that be stricken.

Mr. Downing: Oh no.

Mr. Callaghan: As not responsive to the question.

The Court: Motion denied.

By Mr. Callaghan:

Q. In whose possession, Mr. Witness, was this document when you first saw it?

A. Mr. Gordon.

Q. You had been to 215 East Erie Street a matter of five days prior to this date, hadn't you?

Mr. Downing: To which date?

Mr. Callaghan: Prior to July 27 when he said he got this document.

By The Witness:

A. It was closed.

By Mr. Callaghan:

Q. You had been to 215 East Erie Street five days prior to this time, hadn't you?

Mr. Downing: If your Honor please—

By The Witness:

A. 215 East Erie, are you talking about this place or 215 Erie? 215 Erie I had never been to until the 27th.

453 By Mr. Callaghan:

Q. What is the address on that slip?

A. 215 Erie.

Mr. Downing: You are referring to Government's Exhibit—

The Witness: There are two addresses on there. There are two addresses on there.

Mr. Downing: Let the record show—

Mr. Callaghan: Government's Exhibit 83.

Mr. Downing: Let the record show there are two addresses on that.

Mr. Callaghan: I submit I should be permitted to finish this cross examination without the help of Mr. Downing. I don't need it, frankly.

The Court: Ask your question.

By Mr. Callaghan:

Q. You had been, had you not, to 215 East Erie on July 22?

A. No, sir.

Q. On July 22 you said you met Mr. Gordon at Division and Lake Shore, is that so?

A. Either Lake Shore Drive or Michigan.

Q. Or Michigan Avenue?

A. One of the two.

454 Q. And that Mr. Gordon got into his car and drove a couple of blocks and turned into an alley, didn't you?

A. I didn't say a couple of blocks. I said down by the corner of the alley.

Q. Down to the corner of the alley. As I understood your testimony, you indicated he drove a short distance and then turned into an alley, is that right?

A. Yes.

Q. And that was on July 22, was it?

A. Yes, sir.

Q. And you identified pictures shown you by the Government here—I have forgotten the numbers now—of that alley that you went to on July 22?

A. Yes, sir.

Q. And that was the rear of 215 East Erie Street, wasn't it?

A. No, sir.

Mr. Callaghan: May I have those pictures, please?
May I have all of them?

By Mr. Callaghan:

Q. Will you look at Government's Exhibit 87 for identification, Mr. Marshall?

455 A. This is 215 East Erie, the back. This is 217.

Q. Were you there on July 22?

A. No, sir.

Q. Were you ever in that alley?

A. Yes, sir.

Q. On July 22?

A. No, sir.

Q. Or on July 20?

A. No, sir.

Q. How long have you been in Chicago, Mr. Marshall?
I mean on the occasion of your coming for your testimony in this case.

A. I came last Thursday, a week ago yesterday.

Q. Have you been to the premises of 215 East Erie since you got here?

A. I don't believe so.

Q. You only have been here four or five days?

A. I beg your pardon?

Q. You have only been here five days?

A. Five days—I have been here eight days.

Mr. Callaghan: I want the record to show that it took the witness several seconds to make up his mind what his answer was to that question.

Mr. Downing: I object.

456 By Mr. Callaghan:

Q. And you are not sure whether you have been to 215 East Erie since you got here?

A. No, sir.

Q. Have you been to 215 East Erie since July 27?

A. No, sir.

Mr. Callaghan: That is all.

The Court: Take a recess of ten minutes.

(Recess taken.)

The Court: Mr. Walsh, cross examine on behalf of the defendant MacLeod.

Cross Examination

By Mr. Walsh:

Q. Mr. Marshall, did you at any time since the transactions about which you have testified seen Mr. Swartz give Mr. Gordon any money?

A. No, sir.

Q. Or did you see him give Mr. MacLeod any money?

A. No, sir.

Q. With regard to MacLeod, I believe you called him MacLeod on direct examination, is that right?

A. I believe it was.

Q. Where did you first hear his name?

457 A. I was shown a picture. I said that was the fellow named Ken, and I learned that his name was Ken MacLeod.

Q. Someone told you then his name was MacLeod?

A. Yes.

Q. And who was that someone?

A. I believe it was Mr. Scheer.

Q. Mr. Scheer?

A. Yes, sir.

Q. The FBI Agent?

A. Yes, sir.

Q. In Detroit, and when did that occur?

A. I don't remember the exact date.

Q. You don't remember the date?

A. No, sir.

Q. Well, was it prior to your appearance before the grand jury here in this case in Chicago?

A. Yes, sir.

Q. Just prior to entering the grand jury room?

A. It was prior. I don't remember.

Q. How many cases of film did you take back to Detroit, you and Swartz take back to Detroit, on the 27th?

A. It was about 27 cases.

Q. And what kind were they?

A. Mostly roll, roll type movie film, Kodak Kodachrome, and there was five or six cases of 100 millimeter professional Kodachrome.

Q. When you testified before the grand jury here in Chicago in connection with this case, did you tell that to the grand jury?

Mr. Downing: I object, your Honor, as to what he told the grand jury.

The Court: Sustained.

By Mr. Walsh:

Q. Did you tell the grand jury anything different than that—

Mr. Downing: Objection.

By Mr. Walsh:

Q. —about the number of rolls?

Mr. Downing: Objection as to what he told the grand jury.

The Court: If he said anything different, he may answer yes or no.

By The Witness:

A. I don't remember the exact testimony.

By Mr. Walsh:

Q. Was your testimony before the grand jury about that transaction the same as it is now?

A. I believe it was.

459 Q. And with regard to the 20th of July, how many rolls of film did you transport to Detroit with Swartz?

A. Approximately ten.

Q. About ten?

A. Yes, sir.

Q. This is the 20th.

A. Oh, 20th—I meant 22d. There was 34 on the 20th.

Q. 34?

A. Yes.

Q. And what kinds were they?

A. 11 cases of magazine film, 8 millimeter; 10 cases of roll movie film; and 13 cases of 300 each of the 116 box type camera film.

Q. Was your testimony before the grand jury in Chicago in regard to this case any different with respect to that transportation than it is now?

A. I don't believe so.

Q. You did not know this film was stolen when you took it to Detroit, did you?

A. No, sir.

Q. And you have told that to the FBI consistently, have you not, the Agents?

A. Yes, sir.

Q. Did you tell it to Mr. Downing?

460 A. I believe so.

Q. And have you told it to the grand jury in this case?

A. I believe so.

Q. I show you a document which I would like to have marked Defendants' Exhibit 5 for identification.

(Said document was marked Defendants' Exhibit 5 for identification.)

461 By Mr. Walsh:

Q. Will you look at this document and tell me if you have ever seen this document or the original of it? It purports to be a certified copy.

Mr. Downing: By that, he is referring to Defendants' Exhibit 5?

Mr. Walsh: 5 for identification.

Mr. Downing: To which I object, your Honor. It is immaterial as to this lawsuit, as to whether he has seen that document.

By The Witness:

A. Yes, sir, I have.

The Court: What is it? Do you have an objection? Do you want the answer stricken?

Mr. Downing: I think the objection should be made and both the question and answer should be stricken because I think the document is immaterial to this lawsuit.

The Court: Wait until I see the document.

Overruled. The answer may stand.

462 By Mr. Walsh:

Q. Will you state whether or not this is a certified copy?

The Court: That he cannot testify.

Mr. Downing: I object to that.

The Court: Ask your question. Whether or not it is a certified copy, he doesn't know.

By Mr. Walsh:

Q. Is this a copy—

Mr. Downing: The document speaks for itself.

The Court: Go ahead.

By Mr. Walsh:

Q. A certified copy of the information to which you pleaded guilty in Detroit before Judge Devin?

A. I believe it is.

Q. And you waived indictment before this was filed, did you not? You signed the document waiving indictment?

Mr. Downing: Objection, your Honor.

The Court: Sustained.

Mr. Downing: I don't think it is material.

The Court: I don't think it is material what the procedure over there was. The only reason I allowed you to ask about this was that I assume you were referring 463 to the number of cases. Isn't that what you were referring to? You were asking him about that immediately prior—

Mr. Walsh: No, that was not my point.

The Court: Oh, that was the reason I let him answer.

Mr. Walsh: I will get at it now, Judge.

By Mr. Walsh:

Q. Mr. Marshall, you have stated now on direct and on cross examination—I am not sure it was gone into on direct—that you have not been given any promises for your testimony.

Is that right?

A. That is right.

Q. Any promise of immunity or reward. Is that true?

A. That is true.

Q. But you have not been sentenced?

A. No, sir.

Mr. Downing: I object.

By Mr. Walsh:

Q. In connection with this plea of guilty, is that right?

A. No, sir.

The Court: That has been gone into.

464 By Mr. Walsh:

Q. Have you been given any threats in connection with testifying here?

A. No, sir.

Q. This indictment, or this information charges that you transported the property knowing it to be stolen, doesn't it?

Mr. Downing: If your Honor please, the document speaks for itself. Furthermore—

The Court: Sustained.

By Mr. Walsh:

Q. Will you tell the court and jury whether any statements were made to you to induce you to plead guilty to this indictment?

Mr. Downing: Objection as to that. Certainly—

The Court: To induce him to plead guilty in Detroit? Sustained. If there were any statements made to induce

him to testify here, you can ask. I don't care what they did in Detroit.

By Mr. Walsh:

Q. You have cooperated with the FBI in this matter since your plea, have you not, with the Agents?

A. I think so.

465 Q. You think so. That is, you have done what they have requested you to do?

A. Yes, sir.

Q. How many statements altogether would you say you have signed?

Mr. Downing: Just a minute, your Honor. Objection for repetition.

The Court: Sustained. We agreed that both would cross examine, but that was all thoroughly gone into by Mr. Callaghan's cross examination, and it becomes repetitious. We were going to eliminate repetition in our cross examination, if you remember.

Mr. Walsh: If it please your Honor—

The Court: If you want to take the witness first next time, I will let you do that, but he has gone into that so thoroughly, how many statements he signed, that it would unnecessarily protract the trial.

Mr. Walsh: He went into it from the point of promises made to him. I want to go into it from the point of view of threats.

The Court: You just asked him if there were any threats and he denied it.

466 By Mr. Walsh:

Q. When you went to 215 East Erie Street on the 27th with Mr. Swartz did you ring the bell or knock at the door when you arrived there?

A. Yes, sir.

Q. Who did that, you?

A. I did.

Q. And who answered the door?

A. Mr. Ken.

Q. And what did you say?

A. I said, "Is Ken here"?

Q. And what did he say?

A. He said, "I'm Ken."

Q. I believe you stated both on direct examination and cross examination that you did not know, or that you don't know—

A. Don't know what?

Q. Whether Mr. MacLeod was present on the 20th or not; that it resembles him.

A. I said a man resembling Mr. McLeod—

Q. How long were you in his presence on the 27th?

A. Ten or fifteen minutes.

Q. Did all three of you go back to this garage in the rear of 217?

467 A. Mr. MacLeod and Mr. Swartz and myself did.

Q. Who loaded the film in your car?

A. Mr. MacLeod and myself.

Q. Mr. Swartz didn't do any lifting?

A. Mr. Swartz—

Q. Did he or not, yes or no?

A. No, sir.

Q. Prior to July 27, 1950, had you ever had any transactions with Mr. MacLeod?

A. Repeat that question, please.

Q. Prior to July 27, 1950?

A. Outside of—I thought it was him on the 20th—no, sir.

Q. But you are not certain it was him?

A. No, sir.

Q. On the 20th?

A. No, sir.

Q. You are not certain beyond a reasonable doubt?

A. It resembled Mr. MacLeod but I am not certain.

Q. That is as far as you want to go?

A. Yes, sir.

Q. Then on the 22nd Mr. MacLeod had nothing to do with that transaction to your knowledge?

A. No, sir.

468 Q. You made your sale to Mr. Ahee on what date?
Mr. Downing: Objection, your Honor. The sale was all thoroughly discussed.

Mr. Walsh: No. I think I can cross examine to some extent. My man's liberty is in jeopardy just as much as the other man's.

Mr. Downing: Certainly.

The Court: I will let him answer this much, but don't be repetitious. We agreed that if you want to take a witness first instead of Mr. Callaghan taking him first, you can do that, and obviously whoever cross examines first

will do the major part. I don't want to restrict you in anything that will protect the interests of your client.

On the other hand, I don't want unnecessary repetition. I want to finish with this witness this morning. You use your own judgment. If you think it is necessary for you to go into this for your client, I will permit you to do so, but I will ask you to abide by the agreement all of you made with me in the beginning of the trial, that you can elect which one wants to take the witness first for cross examination; and the second man will not repeat any more than necessary what has been gone into by the first one.

You follow that. You understand it as well as I do.

Mr. Walsh: I suggest to your Honor—

By The Court: If you think it is necessary go ahead.

Mr. Walsh: I would like to talk with your Honor outside of the presence of the jury on that.

The Court: No. You go ahead with your examination.

By Mr. Walsh:

Q. Mr. Marshall, you made your first sale to Ahee when?

A. I believe it was Friday the 21st.

Q. 21st?

A. Yes, sir.

Q. And then after that did you sell and deliver any more to him?

A. Yes, sir, on Monday.

Q. On Monday. And when was your next transaction with him?

470 A. The 28th.

Q. Tell us the details of that transaction.

A. I put—

Q. Did he telephone you to start the transaction?

A. I believe he did.

Q. At your place of business?

A. Yes, sir.

Q. And then did you after that phone conversation take two cases of film—

A. No, I put three cases in my car and went downtown.

Q. Downtown?

A. Parked my car in a parking lot.

Q. What street?

A. Clifford and Bagley.

Q. Sir?

A. Clifford and Madison—

Q. How close is that to Ahee's store?

A. A block and a half.

Q. Did you park there with the intention of being close to his store?

A. I parked there almost every time I would go downtown.

Q. Did you intend to go to Ahee's store on this occasion with the film?

471 A. Yes, sir.

Q. And did you go out there?

A. Yes, sir.

Q. To his store?

A. Yes, sir.

Q. Did you deliver the film?

A. No, sir. Mr. Ahee and myself went out and had dinner, and then Mr. Ahee got his car and drove over to my car, and I gave him the two cases of film and left one in my car.

Q. You left one in your car, and that was on the 28th?

A. Yes.

Q. Mr. Ahee left you?

A. Yes, sir, Mr. Ahee left me.

Q. With the film. Where did you go?

A. I went to the Metropolitan Building, 33 Jonar.

Q. Eventually you came back to your car, is that right?

A. Yes, sir.

Q. You parked it somewhere on Woodward Street, I believe you told us?

A. No, sir.

Q. On Woodward Avenue?

A. No, sir. I parked it on Jonar and Madison.

Q. Didn't Mr. Scheer come up to you on Woodward Avenue, or did I misunderstand?

472 A. I drove a friend of mine down to Jefferson, and then I started back towards my store, and Mr. Scheer stopped me on Woodward.

Q. Did he curb you with another automobile?

A. Yes, sir.

Q. Was he alone?

A. No, sir.

Q. Another Agent?

A. Yes, sir.

Q. Did he pull you over to curb?

A. No, I parked right there?

Q. Did you intend to stop there or did they order you to stop?

A. No, sir, I parked there and went to get a coke.

Q. Walked into a store?

A. Yes, sir.

Q. Did you see them in their car before you parked?

A. Yes, sir.

Q. And where were they in their car?

A. They were behind me.

Q. Sir?

A. They were behind me.

Q. Were they parked?

473 A. No, sir.

Q. Or following you?

A. Following me.

Q. Did you stop to see if they were following you?

A. Yes, sir.

Q. I see. And they came there and arrested you, is that right?

A. They came there and—yes, sir, they arrested me.

Q. And how long was it after that that you made a statement?

A. That same evening.

Q. Now, you didn't turn over some documents here until August 27, is that right?

A. That is right.

Q. Did you see Agent Scheer in the meantime?

A. I believe I seen him once or twice.

Q. Were you arraigned in connection with that arrest?

Mr. Downing: Just a minute. I object to that. That is repetitious.

The Court: Sustained. It is immaterial in any event.

Mr. Walsh: I want to find out simply whether he was conscious that he was in custody or under bail when he was making all these statements:

474 The Court: It is immaterial. Sustained.

By Mr. Walsh:

Q. Have you seen Mr. MacLeod since July 27, 1950?

A. Yesterday.

Q. Yesterday. And were you in the company of an Agent at that time?

A. I was in the court room.

Q. Sir?

A. I was in the court room.

Q. Oh, you didn't see him until you came into the court room again?

A. No, sir.

Q. Now, in connection with this doubt as to whether you visited 215 East Erie Street during the last five days since last Thursday, as a matter of fact you went out with some Agents of the FBI to take pictures of various places, didn't you?

A. No, sir.

Q. You didn't?

A. No, sir.

Q. Did you make any tour of Chicago with the idea of identifying premises—

A. Yes, sir.

Q. In the company of Agents?

475 A. Yes, sir.

Q. Who were those Agents?

A. I don't remember their names right now.

Q. You don't remember. Are they here now? How about Mr. McCormick?

A. I am not sure whether Mr. McCormick was there or not.

Q. Mr. Mehegan?

A. I don't believe Mr. Mehegan was there.

Q. Mr. Scheer here?

A. I believe Mr. Scheer was along.

Q. And as you rode around you discussed whether this building was 215 East Erie or whether it was not, didn't you?

A. I don't believe we went to 215 East Erie. We went to—

Q. Other places?

A. One spot where I went the second time.

476 Q. How long did your trip take?

A. About an hour or an hour and a half.

Q. Now, before I close, on each and every occasion that you have been asked about the transportation of this

material, of this film, you have stated, have you not, that you did not know it was stolen when you transported it?

A. Except for the final plea there.

Q. Other than your plea of guilty?

A. Yes, sir.

Q. And, as a matter of fact, on that occasion you started to say something about it and were stopped, weren't you?

Mr. Downing: Objection.

The Court: Sustained.

The Witness: I was under legal counsel.

The Court: There is no question.

By Mr. Callaghan:

Q. And your counsel made an agreement with the Court?

A. I don't know.

Mr. Downing: Objection.

The Court: Sustained.

Mr. Walsh: That is all.

The Court: Is there any redirect?

477 Mr. Downing: Yes.

Redirect Examination

By Mr. Downing:

Q. Mr. Marshall, you identified Mr. Swartz. Actually there are two Mr. Swartzs that you have identified in this examination, is that right?

A. That's right.

Q. And they named the person who made the shipments with you to Chicago, as you testified, his name is Al Swartz, is that right?

A. Yes, sir.

Q. And your attorney's name is Frank Schwartz?

A. Frank Schwartz.

Q. It is spelled differently?

A. It is spelled differently.

Q. So that is not the same person?

A. No, sir.

Q. Now, in view of the cross examination on the quantity of film you took—

Mr. Callaghan: I object to counsel posing speech before he asks the question.

The Court: Sustained. Ask the question.

By Mr. Downing:

478 Q. How many cases of film did you take back with you to Detroit, Michigan on the 20th of July, 1950?

A. 34.

Mr. Walsh: On the point of repetition, I object to that as having been gone into on direct—

The Court: I think that was sufficiently covered.

Mr. Downing: The only point is that there were numerous questions asked on cross examination in an attempt to confuse the issue—

Mr. Callaghan: I object to that.

Mr. Walsh: I object to that and I move for the withdrawal of a juror.

The Court: The motion is denied, and the statement may be stricken. I sustain the objection, and I think there are a number of these things. If I open it on redirect, we will have further on recross on it, and I understand we want to finish this session this morning.

Mr. Downing: I have one more question, then, Your Honor.

By Mr. Downing:

479 Q. With respect to the person you saw at 2:15 you identified as Ken, I believe you stated that on cross examination. Is that the Kenneth MacLeod that you see here and pointed out yesterday in the courtroom?

A. Yes, sir.

Mr. Downing: That is all.

The Court: Is there any recross?

Mr. Callaghan: No.

The Court: Is there any recross, Mr. Walsh?

Mr. Walsh: No, Your Honor.

(Witness excused.)

480 Mr. Downing: If your Honor please, there is a ruling pending on Government Exhibit 89 which I had offered.

The Court: Oh, excuse me. Hand it up.

Objections, if any, to Government Exhibit 89.

Mr. Callaghan: Yes, I object to that as being a self-serving statement of the witness, a statement made by the witness out of the presence of the defendants, and in no sense and in no wise binding on the defendants, and it is something simply that the witness made up at the time he gave, or at the time the agent went to get something from his store.

The Court: He testified in accordance with this? Was the testimony in any wise different?

Mr. Downing: He testified that he turned over the cartons described in that exhibit there to the agent of the FBI.

The Court: And in the numbers indicated?

Mr. Downing: No, he did not indicate—yes, but he didn't state for the record the quantities by the type, as illustrated in that exhibit.

481 The Court: But he testified he did turn them over?

Mr. Downing: Oh yes.

The Court: I think in so far as it is helpful it would only corroborate his testimony. It was for the purpose of refreshing his recollection, for which purpose I permitted him to use it.

Mr. Downing: Yes.

The Court: I see no purpose in cluttering the record with it.

Mr. Downing: Other than the fact that it definitely shows it by type of carton.

482 The Court: Well, I think he testified sufficiently.

Mr. Callaghan: I suggest he put in evidence the five statements the witness made, instead of that.

Mr. Downing: I object to the gratuitous statement of counsel when we are not discussing that.

The Court: The exhibit 89 will be withdrawn, or I will sustain the defendant's objection.

Mr. Downing: I will withdraw it.

The Court: I think it served every purpose it can thus far without receiving it.

Mr. Downing: I withdraw it at this particular time, then.

The Court: Very well.

HENRY A. SCHUTZ, JR., called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Downing:

Q. Will you state your name, please?

A. Henry A. Schutz, Jr.

The Court: How do you spell the last name?

The Witness: Schutz.

483 By Mr. Downing:

Q. What is your business or occupation, Mr. Schutz?

A. Special Agent for the Federal Bureau of Investigation.

Q. How long have you been so employed?

A. Nearly four years.

Q. And at what office are you now stationed?

A. In Detroit, in the Field Division.

Q. And you were so stationed in July and August, 1950?

A. I was.

-Q. Directing your attention to Government's exhibits 1 to 8, 10 to 16, 24 to 25, 27 through 43, and 45 through 52, I ask you if you will step down from the witness stand and look at these exhibits which are lined up here in front of the—

Now, will you resume the witness stand, Mr. Schutz. I ask you if you have seen those exhibits before?

A. Yes, I have.

Q. And what date did you first see those exhibits?

A. On July 28, 1950.

Q. Where did you see them?

A. In the basement of 157 West Nine-Mile Road, Ferndale.

Q. Do you know what the name of that establishment is?

484 A. That is a jewelry store belonging to Mr. James Marshall.

Q. Who else was present at that time?

A. Special Agents Transeith and Sullivan.

Q. And did you place your initials on each of those exhibits?

A. I did.

Q. On what date did you place your initials thereon?

A. On July 28, 1950.

Q. For the purposes of illustration of one of the exhibits, were you identifying Government's exhibit 2 marked for identification—

Mr. Callaghan: I object. This is purely cumulative.

The Court: Just let him on one of them show the initial.

Mr. Downing: Yes.

By Mr. Downing:

Q. Show where your initials are, please.

A. My initials up here, there—"H. A. S."

Q. That is the second initial appearing below the date, is that right?

A. Yes.

Q. Are you acquainted with James Marshall?

A. I am.

485 Q. Was James Marshall present at the time you obtained these exhibits?

A. He was.

Q. And at that time was an inventory prepared of the cartons which you obtained at that location?

A. Yes, there was.

Q. I show you Government's exhibit 90, marked for identification, and ask you to look at that, and I ask you if you have seen that before?

A. Yes, I have.

Q. And by whom was that exhibit prepared?

A. It was prepared by Special Agent Norman Transeth and Special Agent Sullivan, and myself.

Q. Who actually wrote it up?

A. Mr. Transeth.

Q. And when was that document prepared?

A. At the time that we obtained these boxes, or cartons of film from Mr. Marshall's basement, on July 28, 1950.

Q. Was it prepared out or written out in Mr. Marshall's jewelry store there?

A. That's right.

Q. Now, is that document signed by you, Mr. Schutz?

A. Yes, it is.

486 Q. And with respect to the signatures appearing thereon, is your signature the third signature appearing on the document?

A. Yes, it is.

Q. And when was that signature affixed thereto by yourself.

A. It was affixed on that date, on July 28, 1950.

Q. Now, is that a list of the inventory of cartons which you previously identified here in the court room?

A. Yes, it is.

Q. With respect to these cartons that you have identified, which you have previously testified about, were they full at the time that you first saw them?

A. Yes, they were all full, with the exception of two, one carton, or one pack, a roll of film was missing from one of these cases, and another case, there were two 100 rolls missing.

Q. Do you remember the type of film those were?

A. 16 millimeter.

Q. And is that in the type as illustrated by the carton, Government's exhibit 2, marked for identification?

A. Yes, sir, it was.

Q. Now, what, if anything, did you do with the cartons after locating them in Marshall's basement, and 487 inventorying them, as you testified?

A. We removed the cartons to two automobiles that we had outside, and drove to the office of the Federal Bureau of Investigation, at which time we unloaded the film at the office.

Q. Did you then place it in the office of the Federal Bureau of Investigation?

A. Yes, we did.

Q. That took place in Detroit, Michigan, on July 28, 1950?

A. That's right, sir.

Q. I show you Government's exhibit 89, marked for identification, and I ask you to look at that, and I ask you if you have seen that before?

A. Yes, sir, I have.

Q. I ask you with respect to that document, was that signed in your presence?

A. Yes, it was.

Mr. Callaghan: That is objected to. Your Honor just sustained an objection to that exhibit, and he again tenders it to another witness.

The Court: I allowed him to withdraw it, and he said he would present it again, I believe.

488 By Mr. Downing:

Q. Who was that signed by in your presence?

A. It was signed by James I. Marshall.

Q. When was it signed in your presence?

A. On the evening of July 28, 1950.

Mr. Downing: You may cross examine.

492 ROBERT C. MURPHY, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Downing:

Q. Will you state your name, please?

A. Robert C. Murphy.

Q. What is your business or occupation, Mr. Murphy?

A. I am a special agent of the Federal Bureau of Investigation.

Q. How long have you been so engaged?

A. Nine and a half years.

Q. What office are you now stationed at?

A. Detroit, Michigan.

Q. And were you so stationed there in July and August of 1950?

A. Yes, sir.

Q. Directing your attention to Government Exhibit 9, 29 and 44—

A. Yes, sir.

Q. I ask you to look at each of those, and I ask you if you have seen them before?

A. Yes, sir.

Q. On what date did you first see them?

493 A. On July 28, 1950.

Q. Where were you when you first saw those?

A. At the residence of Edmund A. Ahee.

Q. And in what town did Mr. Ahee live at that time?

A. Detroit, Michigan.

Q. Did you obtain these cartons from Mr. Ahee on that date?

A. Yes, sir.

Q. And at that time did you place your initials or name on each of the cartons?

A. I did.

Q. Now, showing you Government Exhibit 9, marked for identification, will you point out to the Court and jury your initials and name?

A. My initials appear on this box, Your Honor.

The Court: All right.

By The Witness:

A. (Continuing) Here are my initials with the date (indicating).

By Mr. Downing:

Q. Those are the initials "R.C.M.," is that right?

A. Yes, sir.

Q. On what date were those affixed thereto?

A. On July 28, 1950.

494 Q. And do the same initials and the same date appear on the other two exhibits which I have heretofore

shown you?

A. Yes, sir.

Q. Now, with respect to these cartons, at the time you obtained them, what was their condition? Were they full or empty?

A. One of them was completely full.

Q. Do you recall which of the three it was?

A. It would be ~~one~~ of these two, Sir (indicating). I wouldn't know which one.

Q. By "these two," you are referring to Government Exhibits 26 and 44, is that right?

A. Yes, sir.

Q. With respect to the other two cartons, what was their condition?

A. One carton had 75 rolls in it, and the other one—

Q. Is that one of the cartons?

A. That would be this exhibit here, Sir.

Q. One of the 26 or the 44?

A. Yes.

Q. How about Government Exhibit 9?

A. Government Exhibit 9 had 198 rolls in it.

Q. After obtaining these cartons and placing your 495 initials thereon, what, if anything, did you do with the cartons and their contents?

A. I put them in the Bureau car and drove them down to our office, and deposited them in our office.

Q. That is the Federal Bureau of Investigation office in Detroit, is that right?

A. Yes, sir.

Mr. Downing: You may cross examine.

496 LEO C. SHIRLEY, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Downing:

Q. What is your name?

A. Leo C. Shirley.

The Court: Spell the last name.

497 The Witness: S-h-i-r-l-e-y.

By Mr. Downing:

Q. What is your business or occupation?

A. Special Agent of the Federal Bureau of Investigation.

Q. How long have you been so employed?

A. Since 1942.

Q. At what office are you now stationed?

A. Detroit.

Q. And you were so stationed in July and August of 1950?

A. Yes, sir.

Q. Directing your attention to Government Exhibits 17 through 23, I ask you to look at them and ask you if you have seen them before.

A. Yes, I saw this first one; it has my name on it.

Q. By the "first one," you are referring to Government Exhibit 17?

A. And on this one, I have my name on it.

Q. By "this," you are referring to Government Exhibit 23?

Mr. Callaghan: May I suggest that the witness examine all of them, and make one answer, in order to save a lot of time?

498 The Court: All right.

By Mr. Downing:

Q. You can do that. Examine all of them and make one answer.

What is your answer?

A. I have my name, Leo C. Shirley, on each one of those cartons, with the date July 31, 1950.

Q. And where were you when you obtained those cartons?

A. At the Acme Photo Shop in Detroit.

Q. And did the Acme Photo Company turn them over to you on that date?

A. The Acme Photo Company offered to release—

Mr. Callaghan: Wait a minute, please. I object to that.

The Court: Sustained. State what happened. This is direct examination.

By Mr. Downing:

Q. Did you take them into your possession on that date?

A. Yes, sir.

Q. With respect to these cartons, at that time when you obtained them, what was their condition, full or empty?

A. Six of the cartons were full, and the seventh one was partly filled.

Q. After obtaining these cartons and placing your 499 initials thereon, what, if anything, did you do with them?

A. We placed the cartons in the storeroom of the Acme Photo Shop, pending further disposition.

Q. That was the last that you had anything to do with them at that time, is that right?

A. That's right.

Q. Do you recall the quantity in the carton that was not completely full?

A. 23 rolls were in the carton that had been broken open.

Mr. Downing: That is all.

Mr. Callaghan: Mr. Downing, will you tell me the numbers, again, and I won't cross examine him?

Mr. Downing: 17 to 23.

The Court: You have no questions, Mr. Callaghan?

Mr. Callaghan: That's right, Sir.

501

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 50 CR 641) • •

Before Judge Campbell and a Jury,

Monday, June 4, 1951,

10:00 o'clock, a. m.

Court met pursuant to adjournment.

502 (The following proceedings were had in the presence and hearing of the jury).

H. E. BRADLEY SCHEER, called as a witness on behalf of the Government herein, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Downing:

Q. Will you state your name, please?

A. H. E. Bradley Scheer.

The Court: Spell the last name.

By The Witness:

A. S-c-h-e-e-r.

By Mr. Downing:

Q. What is your business or occupation, Mr. Scheer?

A. I am a Special Agent of the Federal Bureau of Investigation.

Q. How long have you been so employed?

A. Three years and three months.

Q. During the period of July—from July through December, 1950, in what office were you stationed?

A. I was in the Detroit Field Office.

Q. I will show you Government's exhibit 53, marked for identification, and ask you to look at that and ask you 503 if you have seen it before?

A. I have.

Q. What date did you first see that exhibit?

A. On July 28, 1950.

Q. Where were you at that time?

A. In Detroit, Michigan.

Q. Who else was present at the time?

A. Well, Agent Leo Robertson was present, Leo Shirley, Agent Schutz was nearby, and James Erwin Marshall.

Q. From whom did you obtain that exhibit?

A. From Mr. Marshall.

Q. Where did Mr. Marshall have the exhibit at the time you obtained it?

A. It was in the trunk of his automobile.

Q. Did you see the automobile at that time?

A. I did.

Q. Will you describe the car that you saw at that time?

A. The car was a 1950 Buick Roadmaster, with a bluish grey body, dark blue top, had a 1950 Michigan license number, E.M. 9645.

Q. At that time what was the condition of the carton? Was it full or empty?

A. The carton was full and sealed.

Q. Did you place your name or initials on the car- 504 ton at that time?

A. I did.

Q. Will you point them out, please?

A. Here on the end.

Q. By that you are referring to the initials and the name "H. E. Bradley Scheer," is that right?

A. That is right.

Q. Was that placed thereon on July 28, 1950?

A. That was.

Q. Mr. Scheer, if you will step down and look at the Government's exhibits here, 54 through 65?

(The witness stepped down off the witness chair to examine the exhibits.)

By Mr. Downing:

Q. Take the witness stand again.

A. Yes.

Q. Now, directing your attention to those exhibits, Government's exhibits 54 to 65, have you seen those before?

A. I have.

Q. On what date did you first see those exhibits?

A. At the date you have on the exhibit, 12-18-50, December 18, 1950.

Q. Where were you when you first saw those exhibits?

505 A. In the basement of the building where the FBI office is located in Detroit.

Q. From whom did you obtain these exhibits at that time?

A. Albert Swartz.

Q. Now, at that time did Albert Swartz place his name or initials or writing on each of these documents?

A. He did, except for the one.

Q. By the one, to what do you refer?

A. Well, on one he wrote "Delivered to" and placed the date and failing to put his name on at the time.

Q. Did you see him affix the other writing on that carton to which you refer?

A. I did.

Q. With respect to Government's exhibit 65, that is one of the group of cartons you received at that time?

A. That was.

Q. Approximately how many boxes of film were in the carton at that time?

A. There were 30 of the boxes of the 16 millimeter commercial Kodachrome film.

Q. With respect to the carton, Government's exhibit 64 which I hand you, how many rolls of film were in the carton at that time?

506 A. There were 4 packages of 25 each of the 116 Verichrome.

Q. With respect to the balance of the cartons which I have shown you in this group of exhibits, was there condition at that time the same as the condition that exists here in the court room at this time?

A. I believe it is. There were ten cartons and one of them had seven rolls missing from one of the cartons.

Q. The balance of the cartons were full, is that right?

A. Yes.

Q. With respect to Government's exhibit 55, the first one I showed you, and Government's exhibits 54 through 65, have these cartons been in the custody of the FBI since that date?

A. They have.

Q. Did you affix your initials or name to each of the cartons, Government's exhibits 54 to 65, that is, this group of cartons, that is, this group of cartons?

A. Those there, yes.

Q. When did you affix your name or initials to each of those cartons?

A. On the date they were received.

Q. December 18, 1950, as you have pointed out previously, is that right?

507 A. Yes.

Q. I direct your attention to Government's exhibit 56, marked for identification, and ask you to look at that and ask you if you have seen that before?

A. I have.

Q. On what date did you first see that exhibit?

A. August 28, 1950.

Q. Where were you at that time?

A. In the office of Dr. Earl Flick, Royal Oak, Mich.

Q. Did you obtain the exhibit from Dr. Flick at that time?

A. I did.

508 Q. What, if anything else, did you obtain from Dr. Flick at that time and place?

A. Well, I received twelve other rolls similar to this.

Q. With respect to the exhibit that you have in your hand, Government's Exhibit 66, has that been in the custody of the FBI since that time?

A. It has.

Mr. Callaghan: I didn't hear you, Mr. Downing.

Your Honor, I didn't hear the question.

The Court: Read the question.

(Question read.)

The Court: Proceed.

By Mr. Downing:

Q. I show you a group of exhibits identified as Government's Exhibits 17 through 23, and ask you to look at those, and I ask you if you have seen those before.

A. I have.

Q. And on what date did you first see these exhibits?

A. On September 26, 1950.

Q. And you are referring to the date that is inscribed on the exhibit, Government's Exhibit 23?

A. That's right.

Q. And have these cartons been in the custody of 509 the FBI since that date?

A. They have.

Q. Now will you step down and look at the balance of these exhibits here, Government's Exhibits 1 through 53?

A. They are mixed up.

By Mr. Downing:

Q. Now, with respect to these exhibits, I ask you if you have seen those before.

A. I have.

Q. With respect to the contents of the exhibits in the court room, Government's Exhibits 1 through 53, I ask you if you know, with respect to the contents of each of those cartons, what, if anything, happened to the contents that were in the cartons.

Mr. Callaghan: I object unless he knows of his 510 own knowledge. Point out the source of his knowledge.

The Court: He asked if he knows.

By Mr. Downing:

Q. Do you have knowledge as to what happened to the contents of Government's Exhibits 1 through 53?

A. I do.

Q. What happened to the contents of those cartons?

A. They were taken from the cartons and turned over—

Mr. Callaghan: I object, if your Honor please, unless he did this that he is testifying to. "They were taken"—if this was done by someone else and this is hearsay, I object to him testifying to it.

The Court: Overruled.

By Mr. Downing:

Q. By whom was this done?

A. By a clerk of the Detroit office, in my presence, and they were later turned over to Mr. Videk of the Marine Adjustment Insurance Company upon the instructions of Mr. Vayo.

Mr. Callaghan: I move that he stricken.

The Court: Motion denied.

By Mr. Downing:

Q. Approximately when did that happen, do you 511 recall, Mr. Scheer? Your best recollection?

A. I think that was sometime in December, but I wouldn't be positive of the date.

Q. And you handled the turning over of the contents of those cartons personally, did you?

A. I did.

Q. I show you Government's Exhibit 89 marked for identification, and I ask you to look at that and ask you if you have seen that before?

A. I have.

Q. With respect to that document, I ask you when you first saw it.

A. On July 28, 1950.

Q. Where were you at that time?

A. In the jewelry store of James Erwin Marshall at 157 West Nine Mile, Ferndale, Michigan.

Q. And with respect to that document, was it signed in your presence?

A. It was.

Q. Was it signed by James Irwin Marshall in your presence?

A. It was.

Q. With respect to the cartons described in that exhibit, did you see those cartons on that day?

512 A. I did.

Q. Are the cartons included in the group of cartons which I have shown you here in the court room? Were they the ones obtained from James Irwin Marshall on that date?

A. Those cartons mentioned here are a portion of those shown here.

Q. I show you a document which has been identified as Government's Exhibit for identification 78 and 83, each marked for identification, and I ask you to look at those and ask if you have seen them before?

A. I have.

Q. With respect to each of those documents, when did you first see them?

A. On August 28, 1950.

Q. From whom did you obtain them?

A. James Irwin Marshall.

Q. Where were you at that time?

A. In the FBI office in Detroit.

Q. Now, with respect to each of those exhibits, have they been in the custody of the FBI since that date?

A. They have.

Q. With respect to the white paper inclosed in each of the exhibits, by whom was that prepared?

513 A. By myself.

Q. Was that prepared at the time you obtained each of the exhibits inclosed in the respective envelopes?

A. It was.

Mr. Callaghan: That is objected to as immaterial. If he is trying to make competent a lot of testimony an FBI Agent has included in an envelope concerning some exhibit, I think we are wasting time, and I object to it.

The Court: The objection is overruled, and the answer will stand.

Mr. Downing: At this time, if your Honor please, the Government would like to offer in evidence Government's Exhibits 1 through 66, which are the group of cartons here in the court room, and Government's Exhibits 78, 86, and I again submit for your Honor's consideration Government's Exhibit 89, which has heretofore been withdrawn, and they may cross examine.

The Court: I suppose you had better cross examine before you object to the exhibits.

514

Cross Examination

By Mr. Callaghan:

Q. Mr. Scheer, which exhibits did you get from Mr. Swartz?

A. Well, roughly, that stack (indicating).

Q. Come down and tell us, unless Mr. Downing wishes to state—

Mr. Downing: Exhibits 54 through 65.

Mr. Callaghan: You are identifying now 54 through 65?

Mr. Downing: That's right.

By Mr. Callaghan:

Q. On what date did you obtain those from Swartz?

A. On the date inscribed thereon.

Q. What date is that? Have you any independent recollection of it at all?

A. No, I made the notation here of December 18, 1950.

Q. December 18?

A. Yes.

Q. 1950?

A. Yes.

Q. Is everything here now that you got from Swartz in December of 1950?

A. To the best of my recollection. To the best of 515 my recollection everything is there.

Cross Examination

By Mr. Walsh:

Q. I believe you testified there was a license plate on an automobile.

A. I did.

Q. What number?

A. EM-9645, Michigan 1950 license.

Q. Do I understand that there was one plate on the car, or two?

A. That was the rear plate. I didn't observe whether there was a front plate or not. I think in Michigan they don't have a front license.

Q. Well, do you know whether they have two plates?

A. I don't recall for sure.

Q. Did you look at the front plate of this car, or look to see if there was one?

A. I had no occasion to.

Q. You only checked the back plate?

A. That's right.

Mr. Walsh: I think that is all.

The Court: Is there any redirect?

Mr. Downing: No, your Honor.

The Court: That is all. You may step down.

(Witness excused.)

516 The Court: Objections, if any, to the proffered exhibits.

Mr. Callaghan: Your Honor has once sustained or indicated you would sustain an objection to Government's Exhibit 89.

The Court: I still don't see any need for putting it in the record. There is no use wasting time.

Mr. Downing: We will withdraw it then, your Honor.

Mr. Callaghan: That is what happened the last time it was offered.

So far as Exhibit 78 is concerned, may it please your Honor, your Honor also at the time the witness attempted to testify to the contents thereof, limited his examination to the figures appearing on the lefthand side. They are all in the record, and he testified to what he said appeared in this lower lefthand column, and your Honor sustained an objection to other than what appeared any place other than the lefthand side.

He testified to what is in the record, and he is covering it by putting additional records in—

517 Mr. Downing: It is corroborative of the testimony and part of the *res gestae*.

Mr. Callaghan: Your Honor sustained an objection to three-fourths of what is on that card.

Mr. Downing: Well, I disagree with that.

The Court: This is the one that Swartz testified to?

Mr. Callaghan: No, Mr. Marshall testified and you started to sustain an objection to the conversation and said that made the card incompetent.

Mr. Downing: No, he didn't say that.

Mr. Callaghan: Except for the figures appearing on the lefthand side. That is exactly what the court said. The record will show it.

The Court: I permitted Mr. Marshall to testify as to the notations he made hereon, and what they meant in so far as he was concerned, and I think that is sufficient. If it goes in now, as you say, it is merely corroborative of his testimony.

Mr. Downing: It is part of the *res gestae* and part of the transaction that took place on the 20th of July, 518 and as such I think the jury has a right to that document.

The Court: It is purely corroborative; don't you agree?

Mr. Downing: It is, but certainly—

The Court: It has no independent probative value other than to corroborate what he testified to.

For what other purpose did you want it in?

Mr. Downing: Of course, under the circumstances, your Honor, it seems to me that in view of the facts that exist, and in view of Marshall's testimony, he testified he got this from Swartz on the date indicated.

Mr. Callaghan: Now, he is going to get it in evidence, whether you admit it or not. He is going to tell the jury about it. I object to that.

Mr. Downing: And that on the 20th of July he came to Chicago and got this merchandise—

Mr. Callaghan: I object to counsel talking about the exhibit in front of the jury. I will point out what the evidence is.

The Court: Well, he can cover it in his closing argument, and I will let you do the same.

519 For what it is worth, I will receive it. I think it is corroborative, more or less.

Mr. Walsh: I object to its form, and it should be out of the cellophane envelope.

Mr. Downing: I will agree to that, I will take the white document out of it.

Mr. Callaghan: May I call your Honor's attention to how it came into the record?

The Court: I recall.

Mr. Callaghan: Marshall was testifying about a conversation he had, and when he got to that point of conversation that he had with Swartz an objection was made.

The Court: That's right.

Mr. Callaghan: Your Honor properly sustained the objection and said, "The writings on this card appear to be the result of a conversation. Except for the figures appearing in the lefthand column, I will sustain object to that document."

The Court: I allowed him to testify to the document.

Mr. Callaghan: On the lefthand side, yes, sir, the \$550, and you said, "The other figures are obviously the result of a conversation," and that you will sustain an objection.

520 The Court: I recall I didn't let him put in some testimony on the prices.

Mr. Walsh: Later the man testified he sold some of this stuff at certain prices, and that is the only thing that is in, but these figures are not in.

The Court: I recall that I allowed him to testify only to the number of boxes.

Mr. Downing: That is right.

The Court: And then he later testified to what he sold this merchandise for.

Mr. Downing: That is right, and the only objection at that time was with respect to a conversation Mr. Callaghan—

The Court: And I think it was proper.

Mr. Downing: Which I agreed with.

The Court: And it was out of the presence of these defendants.

Then in so far as that, if you can cut off that portion of it, that might be admissible.

Mr. Downing: I can blot out that portion.

The Court: Well, do you think it is important enough to put in? If you want to cut it apart and put that much in, I have no objection to your doing that, but the rest of it, I sustain, and I recall now in looking at my notes that I did sustain an objection to these prices going in. I don't see how they can get in now by putting in the card, and I wouldn't permit the witness to give them.

Mr. Downing: I shall be glad to blot out the prices.

The Court: If you can do that, you can put in the rest of the card. Let me see it after you do that. To that extent the objection is sustained.

Now, how about the next one?

Mr. Downing: That is 83.

Mr. Callaghan: Government's Exhibit 83 is a card or a piece of paper.

The Court: I think I saw that once before, didn't I?

Mr. Callaghan: I think so. It is a piece of paper Marshall said that he got from Mr. Swartz when he saw Gordon hand it to Swartz.

Mr. Downing: On the 2d of July.

The Court: Let me have it.

What are your objections?

Mr. Callaghan: There being no proof that document is in the handwriting of the defendant Gordon. I object to it on that ground. There was no special basis laid for its admission in evidence.

The Court: Do you object—

Mr. Callaghan: Pardon me. I object to the supporting data.

The Court: That is not offered?

Mr. Downing: No, I intend to take that supporting data out.

Mr. Walsh: I object to that document, being part of a transaction and conversation out of the presence of the defendant MacLeod between the witness or the defendant Gordon and Swartz, according to the testimony, but Mr. MacLeod was not present.

The Court: The objection is overruled. Government's Exhibit 83 will be received in evidence.

Remove the descriptive information.

(Whereupon said document, so offered and received in evidence, was marked Government Exhibit 83.)

The Court: As to the cartons, what have we, Government's Exhibit 1 through 66?

Mr. Walsh: I object to them as being immaterial 523 and irrelevant in the state of the record, as far as allowed.

Mr. Callaghan: That is the only basis of my objection, on the state of the record no sufficient foundation has been laid for their introduction.

The Court: ~~Both objections overruled~~, and the exhibit will be received in evidence.

(Whereupon said exhibits, so offered and received in evidence were marked, respectively, Government Exhibits 1 to 66, both inclusive.)

The Court: You may proceed.

Mr. Downing: Mr. Trainer.

Mr. Walsh: I want the record to note particularly that I object to those cartons which did contain files of the type described by Marshall as having been obtained on the 20th and 22d.

The Court: The record may show your further objection, which is likewise overruled.

524 CHARLES H. TRAINER, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Downing:

Q. Will you state your name?

A. Charles H. Trainer, T-r-a-i-n-e-r.

Q. What is your address?

A. Business address?

Q. Business address, yes.

A. 307 North Michigan.

Q. That is here in the City of Chicago?

A. That is right.

Q. What is your business or occupation?

A. I am manager for the Bell Building Corporation.

The Court: What corporation?

The Witness: Bell Building Corporation.

Mr. Downing: Keep your voice up so that the court and the members of the jury and the members at the table can hear you.

By Mr. Downing:

Q. How long have you been so engaged?

A. Since 1935.

525 Q. Just briefly, what is the nature of your duties?

A. Renting manager.

Q. In connection with your duties, are you acquainted with the property at 215 through 223 East Erie Street in Chicago, Illinois?

A. Yes, sir.

Q. Are you acquainted with the present lessee of that property?

A. I am.

Q. At the present time to whom is that property leased?

A. Kenneth MacLeod.

Q. Are you acquainted with Kenneth MacLeod?

A. I am.

Q. Will you look around the court room and see if Kenneth MacLeod is present there, please?

A. Right there (indicating).

Mr. Downing: Let the record show the witness has identified the defendant, Kenneth MacLeod.

The Court: It may so show.

By Mr. Downing:

Q. With respect to that lease, did you handle the leasing of that property yourself?

A. I was interested in it with one of the other employees at the office.

526 Q. Directing your attention to Government's Exhibits 84, 85, 86, 87 and 88, I ask you to look at each of those exhibits, and I ask you if you can recognize the property illustrated therein.

A. Yes, I do.

Q. I ask you if that is the property at 215 through 223 East Erie Street, in Chicago?

A. Yes, sir.

Q. And that is the property that you leased to the defendant Kenneth MacLeod, that you identified here in the court room, is that right?

A. Yes, sir.

Mr. Downing: You may cross examine.

Cross Examination

By Mr. Walsh:

Q. When did you make the lease, Mr. Trainer?

A. July 1, 1949, to rent for a period of five years.

Q. And it is still in effect?

A. That is right.

Q. And he still occupies the place as a lease?

A. That is right.

Mr. Walsh: That is all.

527 The Court: Do you have any questions, Mr. Callaghan?

Cross Examination

By Mr. Callaghan:

Q. These pictures show a good deal more than 215 East Erie Street, isn't that so?

A. More than 215?

Q. Mr. Downing asked you if these pictures truly represented the property at 215 East Erie Street.

Mr. Downing: I said 215 through 223, for the record.

The Court: That is correct.

By the Witness:

A. That is right.

By Mr. Callaghan:

Q. Do you know what the address is on the righthand side of the picture known as Government's Exhibit 88?

A. I don't know what that address is.

Q. That isn't part of the leased property, is it?

A. No, our building starts here (indicating), and this is the flat—

Q. By "starts here" you indicate a point to the left of the white building at the extreme left of the picture?

A. That is right.

528 Q. Now, the building on the lefthand side in about half of that picture on Government's Exhibit 85, isn't included in the leased premises, is it?

A. That's right, this is -21 and -23, and this is -15 and -17 (indicating).

Q. The building on the right is 215 to 217?

A. That's right.

Q. And the one on the left is—?

A. 221 to 223.—That is the residence, and this is a flat building, an eight-flat building, and a two- or three-story residence.

Mr. Walsh: May I ask another question, your Honor?

The Court: When he finishes.

Mr. Callaghan: I am through.

The Court: You may ask.

Cross Examination (Gtd.)

By Mr. Walsh:

Q. For what purpose was it leased, Mr. Trainer?

A. It was leased for a woman's hotel or a rooming house.

Q. How long has it been a woman's hotel?

A. For many years. It was formerly leased to the 529 Telephone Company, and later it was taken over by an individual who ran it until the time Mr. MacLeod purchased it from him.

Q. Since 1935 have you had charge of that particular building?

A. I have. That is, our office has.

The Court: Is there any redirect?

Mr. Downing: Just a couple of questions, your Honor.

Redirect Examination

By Mr. Downing:

Q. Mr. Trainer, you were shown Government's Exhibit 88. This portion of the property with the double garage door, is that in the property which is leased to the defendant MacLeod?

A. That is right, yes. That is a garage in the rear of the residence.

Q. And that is to the left of the white property that you indicated is not a part—

A. Yes, we have nothing to do with that.

Q. With respect to Government's Exhibit 87, that also illustrates the double garage door which is part of that property?

A. That is right, this is taken from the east, and 530 that from the west.

Q. And Government's Exhibit 85, that is a front view of the property which is leased to the defendant MacLeod, is that right, sir?

A. That's right.

Mr. Downing: That is all.

The Court: Any recross.

Recross Examination

By Mr. Callaghan:

Q. Mr. Downing has indicated to you a place where there is a double garage door, Mr. Witness.

The Court: Indicate the exhibit.

By Mr. Callaghan:

Q. (Continuing) On Government's Exhibit 88 for identification.

Mr. Downing: I said "double door garage", and not a "double garage door."

By Mr. Callaghan:

Q. You understand what I meant, didn't you, Mr. Witness?

A. Yes, there (indicating).

Q. And do you know who occupies that apartment?

A. No, I do not.

531 Q. Does the occupant of that apartment have ingress and egress by means of the garage?

A. I don't know. That is a lease made by Mr. MacLeod to the tenant. He rents the entire property and—

Mr. Callaghan: All right. That is all.

Mr. Downing: That is all.

The Court: Step down.

(Witness excused.)

532 A. D. MEHEGAN, called as a witness on behalf of the Government herein, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Downing:

Q. Will you state your name, please?

A. A. D. Mehegan.

Q. What is your business or occupation, Mr. Mehegan?

A. Special Agent, Federal Bureau of Investigation.

Q. How long have you been so employed?

A. More than 25 years.

Q. At what office are you stationed at?

A. Chicago.

Mr. Downing: May we have a stipulation that the witness can identify the witness Gordon in the court room?

Mr. Callaghan: Oh, sure.

By Mr. Downing:

Q. Now, directing your attention to November 29, 1950, did you have occasion to have a conversation with the defendant Gordon?

A. I did.

The Court: What date?

Mr. Downing: November 29, 1950.

533 By Mr Downing:

Q. Who else was present at that time?

A. Agent McCormick of the Chicago office.

Q. Agent McCormick is sitting there in the court room, is that right, sir?

A. That is right.

Q. Where did you have the conversation?

A. That was in the back of the store of Gordon, at 21 East Adams.

Q. Here in Chicago?

A. Here in Chicago.

Q. Anyone else present besides Special Agent McCormick, defendant Gordon, and yourself?

A. There was other persons in the store. I do not know who they were.

Q. All right. Will you relate the conversation as to what was said at that time?

A. McCormick and myself were in the store. It was about late afternoon, November 29th. There was displayed to Gordon this piece of paper here, one of the Government's exhibits.

Q. By that you are referring to Government's exhibit 83, in evidence?

A. That is right.

534 Gordon was asked whether or not he had any interest in 215 East Erie Street.

He said he did.

What was the place used for?

That is rented to young ladies and girls.

How many are in the place.

He says there is about 100 there now.

What are the gross receipts from the rental of that place?

Oh, \$650 a month.

Mr. Callaghan: I object to all this as being immaterial and having nothing to do with this lawsuit.

Mr. Downing: It shows the relationship between the defendant and defendant MacLeod with respect to the prop-

erty at 215 East Erie Street, in which property some of the contents of the articles were found and is part of the res gestae in this case.

The Court: For that purpose I will let him proceed.

By the Witness:

A. He explained what the profit was.

Mr. Callaghan: He said.

535 The Court: The substance of what he said.

Mr. Callaghan: I object.

The Court: Sustained.

By Mr. Downing:

Q. Will you describe what was said and who said it?

A. He said the profits were about \$400 a month, which he divided between himself and others.

He was asked whether or not he ever had any occasion to write a note to 215 East Erie Street, such as you have in the Government's exhibit.

Mr. Callaghan: I submit, if your Honor please, that he tell us what was said and not he was asked, and such as that.

The Court: Give us the substance of the conversation, what you said and he said.

By the Witness:

A. He said he had occasion to write a note such as 215 East Erie Street with "10" on it, for the purpose of directing tenants and others, who might go to this particular address.

He also said he had in this particular address a counter, he had some merchandise, he had for sale there.

I wanted to know whether he signed this note.

536 He said he didn't think he did, but if he did it would have been signed prior to 1946, when, at that time, the Liberal Loan Bank name was used for the store over there.

The reverse of this read, said, "Liberal Loan Bank."

About this time there was discovered on the floor by Mr. McCormick also right at our feet another piece of paper.

That piece of paper—

By Mr. Downing:

Q. Is this the piece of paper?

A. It was torn. That was it.

Q. Identified as Government's exhibit 91?

A. That is the piece of paper here.

Q. No. 91?

A. No. 91. That is the paper. Gordon was asked what it was.

He said a portion of a scratch pad we got in our business and the name Liberal Bank on it.

Mr. Walsh: I object to this conversation out of the presence of the defendant, and it is not part of the *res gestae*. I do not see how it could be admitted.

The Court: That will be included in an appropriate 537 instruction, as I have indicated heretofore.

By Mr. Downing:

Q. Continue, Mr. Mehegan, please.

A. So, Gordon says, "Yes, we have some of these pads in use right now. You will find some up in the front of the store, a few of them left, we use them once in a while for memorandums and scratch pads."

Q. Are these pads you refer to the type illustrated by Government's exhibit 91?

A. Yes.

Mr. Callaghan: I object to him referring to something similar, making comparisons on which we cannot cross examine him.

The Court: The question and answer may stand.

By Mr. Downing:

Q. Continue, Mr. Mehegan?

A. Then we go back to 1946.

I said to Gordon, "You say that these were not used since 1946?"

He said, "Well, this particular piece of paper here has been used since 1946."

Now, we asked Gordon whether or not he would give us some of his handwriting specimen.

He said, "No," that he did not want to do that. He 538 said if we were interested in that we could call around to his bank and get some hand specimens there of his bank account.

We asked him what bank it was.

He said the City National Bank.

That substantially concluded the conversation.

Q. Directing your attention to Government's exhibit 91, I ask you, has that been in the files of the FBI since the date that you obtained it on November 29, 1950?

A. It has.

Q. I ask you, did you place your initials on that document?

A. My name is on here, "Mehegan."

Q. On what date did you affix your name to that document?

A. On the 29th of November, 1950.

Mr. Downing: At this time, if your Honor please, the Government would like to offer in evidence Government's exhibit 91. They may cross examine.

The Court: I will hear you on the exhibit after cross examination.

Cross Examination

By Mr. Callaghan:

539 Q. Mr. Mehegan, did you see the words "Liberal Loan Bank" on the window there?

A. Yes.

Q. Liberal Loan Bank?

A. Yes.

Q. On the window?

A. In November it was on the window. My recollection, it was on the window. It was also on a post as you enter in that store.

Q. And you saw that in a neon sign in that window?

A. I don't remember of any neon sign being there.

Q. Where else did you see the name "Liberal Bank" displayed in that store?

A. That is the only place I have a recollection. I don't remember seeing it inside the store.

Q. How many times were you in that store?

A. One time.

Q. How many times did you talk to the defendant Gordon?

A. That was the only time.

Q. That you have ever talked to him?

A. That is right.

Q. What time of day was it?

A. Late in the afternoon, probably 4:30.

Q. Where did you talk to him, by the way?

A. In his—in the rear of his store at 21 East.

540 Q. In the back room?

A. I would call it a back room.

Q. How big is that back room, by the way?

A. Well, just would be the store?

Q. Just answer the question, please, the size of the back room.

Mr. Downing: Now let him answer the question.

Mr. Callaghan: No, I want him to answer the question.

Mr. Downing: He asked him to answer the question.

The Court: Proceed with your answer.

By the Witness:

A. The back room, to my recollection, is probably 15' long to the rear wall, and perhaps 8 or 9' wide.

Q. How big is the outside room, then, known as the store proper?

A. Where the customers come?

Q. Yes.

A. Where the customer comes, that is the gross area, that is about 25' feet wide and probably 27, 28' long to the cage where the Cashier has a place there.

Q. This store is all on one floor in those two rooms, isn't it?

541 A. Yes, it is on one floor.

Q. As you come in the store, are there jewelry cases you see?

A. Yes, you come in the store through double swinging doors, enters on an angle, and you see— By the way, the front of the store is on the south side of the street facing north. As you come in, there is a counter on your left-hand side. There is one on your head here and one on the right-hand side.

Q. What is displayed in those counters?

A. I don't know, watches, diamonds,

Q. Watches and rings and diamonds?

A. Watches and rings and diamonds.

Q. You didn't see old guitars, mandolins, old suite of clothes hanging around?

A. No.

Q. Any shotguns or anything of the kind, to indicate that was a pawn shop? You know now it is not a pawn shop?

A. It never was a pawn shop here that I know of.

Q. Everybody has been referring to it as the Liberal Loan Company. You know this is the loan company?

A. I don't know what their business is. I am only telling you that is what it was.

542 Q. Did somebody say that you called the Liberal

Loan Company, Liberal Jewelry?

A. It is the Liberal Jewelers now. It was Liberal Loan Bank then.

Q. In 1950 it was the Liberal Loan Bank?

A. I am certain it was the Liberal Loan Bank.

Q. You are sure about that?

A. I am certain.

Q. You told us all the conversations you ever had with the defendant Gordon?

A. That is all the conversation I remember, yes.

Mr. Callaghan: That is all.

The Court: Do you have any questions?

Mr. Walsh: Except to renew my objection.

The Court: Yes, which I will take care of in an appropriate instruction when I instruct the jury.

Mr. Downing: No redirect, your Honor.

(Witness excused.)

Mr. Downing: May I have a ruling on 91?

The Court: Objections, if any, to exhibit 91, Mr. Callaghan?

Mr. Callaghan: I object to the supporting data 543 which appears on both of these exhibits. This one, by the way, by this one I mean Government's exhibit 91. The supporting data is right on the face of the document itself.

The Court: Them, I have ordered those removed.

Mr. Callaghan: On this one, too?

The Court: Yes. I was going to take that up before it goes to the jury and leave in the envelope only the exhibit itself.

Mr. Downing: That is right.

Mr. Callaghan: I submit on the state of the record, if your Honor please, there is not sufficient foundation laid for this document.

Mr. Downing: 83 in in.

Mr. Callaghan: I thought you were reoffering it.

Mr. Downing: No, I am only offering 91.

The Court: Any objections to 91?

Mr. Callaghan: The only objection is that supporting data, how that fixes their time, dates, and the place and all that sort of thing that the agent put on these things to refresh his recollection.

The Court: Overruled. The exhibit will be received in evidence.

544 (Which said document so offered and received in evidence, was marked Government's Exhibit 91.)

Mr. Downing: Mr. McCormick.

WILLIAM J. McCORMICK, called as a witness on behalf of the Government herein, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Downing:

Q. State your name, please?

A. William J. McCormick.

Q. What is your business or occupation, Mr. McCormick?

A. I am Special Agent with the Federal Bureau of Investigation.

Q. How long have you been so employed?

A. Approximately ten and a half years.

Q. At what office are you now stationed?

A. Chicago.

Mr. Downing: May we have a stipulation he can identify the defendants Gordon and MacLeod in the court room?

Mr. Walsh: I do not stipulate.

545 By Mr. Downing:

Q. Are you acquainted with the defendants MacLeod and Gordon?

A. I am.

Q. Approximately how long have you known each of them?

A. I have known Gordon approximately two or three years, and MacLeod since last November, 1950.

Q. Will you point them out in the court room, please?

A. Mr. Gordon is sitting second man from the end, and Mr. MacLeod is on the end.

Mr. Downing: Let the record show that the witness has identified the defendants Gordon and MacLeod in the court room.

By Mr. Downing:

Q. Directing your attention to November 8, 1950, did you have a conversation with the defendant Gordon?

A. I did.

Q. Who else was present at that time?

A. Special Agent Frank J. Stefanak and myself.

Q. Where did you have this conversation?

A. In Room 2000 Bankers Building, 105 W. Adams St., Chicago.

A. Is that part of the office of the Chicago Branch of the FBI?

546 A. It is.

Q. Will you relate the conversation?

A. At that time I asked Gordon where he lived and he told me he lived at 515 West Roscoe St.

Q. Yes.

A. I asked him what business he was in.

He said he had the jewelry store at 21 West Adams Street, in Chicago; that he also had half interest in the rooming house at 215-217 East Erie St., in Chicago.

He said he was in partnership in the rooming house with Kenneth MacLeod.

Mr. Walsh: The defendant MacLeod objects to this conversation as being after any dates mentioned in the indictment and not part of the res gestae and out of the presence of the defendant MacLeod.

The Court: Yes. The conversation, of course, does not go into evidence as against the defendant MacLeod. As I told you before, we will give an appropriate instruction at the right time.

By Mr. Downing:

Q. Continue.

547 A. He told me that the incomes from the property at 215 East Erie St.—

Mr. Callaghan: Objected to as being immaterial, if your Honor please, and nothing to do with this lawsuit.

The Court: Overruled on the same grounds I overruled the objection with reference to Mehegan.

By the Witness:

A. He told me that the net profits per month were approximately \$500, which was split between himself and MacLeod.

I asked him if he knew James Irwin Marshall. I showed him a photograph. He said he did not, and had never seen that man.

Mr. Callaghan: I submit, if your Honor please, that photograph ought to be introduced in connection with that conversation.

The Court: Do you have it?

Mr. Downing: I do not have it.

The Witness: I do not have it with me.

The Court: You may proceed.

By the Witness:

A. I asked him if he knew Albert Swartz from Detroit..

548 He said he did, that he had sold him jewelry.

I asked him if he had ever sold Swartz or Marshall any film.

He said he had not. He said he was not in the film business; that he had never bought or sold any quantity of film; that the only film that he had ever had was film that he had used himself.

I asked him if, in July of 1950, there had been any film at 215 to 217 East Erie Street.

He said there had not, to his knowledge.

I asked him if the garage in the rear of 217 East Erie Street was a part of the premises that he and MacLeod leased.

He said it was.

And I asked him if there was any film in the garage.

He said not to his knowledge.

By Mr. Walsh:

Q. Was your question directed to whether there was any on November 8th?

A. In July, July of 1950.

I specifically asked him if there were any film in the garage or in the place at 215 to 217 East Erie Street on July 18th or on July 27th.

549 He said that there was not, as far as he knew.

I asked him how long he had known Kenneth MacLeod.

He said he had known him for several years; that MacLeod was his superior officer in the army.

At that time Agent Stefanek asked Gordon to tell us all about the film that had been in the garage in July of 1950.

At that point Gordon said if he told us everyone he had sold stolen merchandise to in the City of Chicago it would involve a great many people.

Mr. Callaghan: Your Honor, I move, that remark having been made, that a mistrial be declared of this lawsuit and the jurors be withdrawn.

Mr. Walsh: I make the same motion on behalf of the defendant MacLeod.

The Court: Motion denied.

By Mr. Downing:

Q. Do you recall anything else that was said at that time?

A. That is all I recall.

Q. At that time was there any statement signed by the defendant Gordon?

A. There was not.

550 Q. Was he requested to sign any statement?

A. No, he was not.

Q. Thereafter, did you have any other conversation with the defendant Gordon?

A. Yes, I did.

Q. When did that conversation take place?

A. On November 29, 1950.

Q. Where did that conversation take place?

A. In his store at 21 West Adams Street, or East Adams Street.

Q. When you said "West Adams" originally, did you mean East Adams or West Adams?

A. I meant the Liberal Loan Jewelry Shop at 21 East Adams.

Q. Who else was present at that time?

A. Special Agent A. D. Mehegan, Gordon, and myself.

Q. Will you relate the conversation as best you can recall it?

A. On that day, Agent Mehegan and myself went to the store after Gordon. I had called Gordon on the telephone. He had invited us over. I told him we wanted to talk to him.

So we went over to the store.--He took us into the back room and I showed him a slip of paper bearing
551 the pencilled notation "Ken 215 East Erie Street."

Q. By that you are referring to Government's exhibit 83 in evidence?

A. I am.

Q. All right.

A. I showed him this Government's exhibit 83 and asked him if he had written that.

He looked at it. He said he didn't believe that he had, but that he couldn't be certain as to whether that was his handwriting or not.

He looked at the reverse side of it, and said, "This bears

the name 'Liberal Loan Bank, 21 East Adams Street'. Since 1946 we have not used that name. The name is now Liberal Loan Jewelers. If I did write it, I must have written it before 1946."

I again asked him if he was certain he had not written it.

He said he was not.

I asked him to give us specimens of his handwriting so that we could make a comparison.

He declined to do so.

Special Agent Mehegan then asked him about his ownership or interest in the place at 215 East Erie St., and he told us that he and Kenneth MacLeod jointly held 552 a lease on those premises.

He said that he sold certain merchandise, costume jewelry and nylons to the tenants of the building; that in connection with that he maintained a counter, display counter, up at 215 East Erie Street, and that he had in the past written notes similar to this, sending prospective tenants up to 215 East Erie Street.

At that point I observed on the floor a scrap of paper which appeared to be, have the identical words "Liberal Bank" on it. I picked it up. Showed it to him and asked him if that were not the same name as appeared on Government's exhibit 83.

He said it was. He said he then recalled that they still did use some of these letterheads "Liberal Loan Bank" for scratch pads and that they had several around the store at that time.

553 Q. On this slip of paper are you referring to Government's Exhibit 91 in evidence?

A. I am.

Q. Do you recall anything else that was said at that time?

A. We again asked him for specimens of his handwriting, and he told us that he didn't care to give it to us, and that if we wanted any we could find them for ourselves, that his bank was the City National Bank.

That is all I recall.

Q. All right.

With respect to Government's Exhibit 91 in evidence, did you affix your initials thereto?

A. I did.

Q. Were those initials affixed thereto on or about November 29, 1950?

A. They were.

Q. Now, have you had a conversation with the defendant MacLeod?

A. I have.

Q. Approximately when did you have a conversation with the defendant MacLeod?

A. I believe that was November 11—November 9, 1950.

Q. Where were you at that time?

554 A. I was at Room 2000 in the Bankers Building.

Q. Who else was present at that time?

A. Special Agent Higgs, Walter Higgs.

Q. Now will you relate the conversation that you had with the defendant MacLeod at that time and place?

A. At that time we asked—Higgs asked MacLeod what was his occupation, and he said that he was the operator, with Kenneth Gordon, of the rooming house at 215-217 East Erie Street.

We asked him where he lived, and he said he lived at 1150 North Lake Shore Drive.

We asked him about the lease on the premises at 215-217 East Erie Street, and he said that the lease was in his name, but that he and Kenneth Gordon were in partnership in the operation of the rooming house at that address.

He stated that he actively managed the building, and that he was there at least once a day in connection with the management of the premises.

We asked him about the garage in the rear of 217 East Erie Street, and he said that that was a part of the premises covered by his lease.

We asked him if he occupied that garage, and he said 555 that he did except during the month of July, 1950, he

had rented the garage for \$20 to some individual whose name he did not know, and who had parked a truck in there for several weeks, and then later disappeared without contacting him or cancelling the rental agreement, or paying him any money.

He said, however, that he had access to that garage at all times.

We asked him if he dealt in Eastman film, and he said he did not, that he had never bought or sold any Eastman film.

We asked him if he knew James Irwin Marshall, or Albert Swantz, from Detroit, and he said that he did not, that he had never heard of either gentleman, and was unable to—he was shown a picture of Marshall—

Mr. Walsh: I object to that unless we have the picture.

The Court: Objection overruled.

Do you have the picture with you?

The Witness: I do not.

The Court: You may proceed.

By the Witness:

A. (Continuing) He stated he had never seen Marshall.

I asked him if, on July 27, there had been any film 556 in the garage at 217 East Erie Street, and he said that

there had not, and I asked him if he would have known had there been, and he said that he would have, and I asked him if, on July 27, 1950, he hadn't loaded any film from the garage into a car bearing a Michigan license, a Buick automobile, and he said he had not.

I asked him if he had loaded any film in any car from that garage or any place on the premises at 215 East Erie Street, and he said he had never done so, that to his knowledge there had never been any film in the garage or on the premises at that address.

Q. Do you recall anything else that was said at that time?

A. I don't recall.

Q. At that time did the defendant MacLeod sign a statement?

A. He did not.

Q. Was he requested to sign a statement?

Mr. Callaghan: That is objected to, if your Honor please.

The Court: Overruled. He may answer.

By the Witness:

A. He was not.

Mr. Downing: You may cross examine.

557 The Court: Who wants to cross examine first?

Mr. Callaghan: Before the cross examination begins, may it please your Honor, I move now to strike the remark upon which I move the court to grant a mistrial, and I ask the court not only to strike it, but to instruct the jury to disregard that portion of the witness' testimony.

The Court: The motion is denied.

Cross Examination

By Mr. Callaghan:

Q. How many conversations have you had with the defendant Gordon?

A. Two in person, and one on the telephone, that I recall.

Q. You testified here to the two conversations that you had with him, is that so?

A. I have.

Q. Now, who was present at the first conversation?

A. Special Agent Frank Stefanak and myself.

Q. Where is Stefanak now, by the way?

A. He is in Chicago. I don't know exactly where he is at the moment.

558 Q. And you were about to name someone else, were you?

A. During the conversation on November 8, Special Agent Robert Walters was present—not during my conversation, but he was in the room for, I would say, approximately a half hour.

Q. Did you record this conversation?

A. I did not.

Q. Did you make any transcription of it at all, by a stenographer, or anybody?

A. I did not.

Q. Did you transcribe it out when you concluded the conversation, and ask Mr. Gordon to sign it?

A. No, I made notes at the time of the interview.

Q. When did you last see those notes?

A. I saw those notes this morning.

Q. You read them very carefully before you took the witness stand, didn't you?

A. Yes, I did.

Q. Now, with whom did you discuss your evidence before you took the witness stand?

A. I have discussed the case with United States Attorney Downing.

Q. When did you last talk to Mr. Downing about your testimony?

559 A. Oh, I think it was last Friday or Saturday.

Q. Did you talk to him this morning after you read your notes?

A. No, I didn't discuss my testimony with him this morning at all.

Q. Now, what was the date of the second conversation?

A. November 29, 1950.

Q. And that took place where?

A. In the store at 21 East Adams Street.

Q. That is the conversation at which Mr. Mehegan was present?

A. That is right.

Q. By the way, you sat in this court room all the while Mehegan testified and heard the entire testimony, didn't you?

A. I did.

Q. Did you and Mr. Mehegan compare your notes this morning?

A. No, we did not.

Q. Did you let Mehegan read your notes?

A. No, I did not.

Q. Did you read his notes?

A. I read his notes.

Q. When did you last read his notes?

560 A. I think I read his notes sometime last week.

Q. Since this trial has begun?

A. Yes, sir.

Q. When did you last discuss your testimony with him?

A. With Mehegan?

Q. Yes.

A. Sometime last week.

Q. Did you tell him what you expected to testify to?

A. No, we had a very general discussion.

Q. General to the extent where you told each other what each of you were going to testify to?

A. No, we read his notes, and that was about the extent of the testimony.

Q. But you didn't read yours; just his?

A. I didn't make any notes at that time.

Q. Sir?

A. I made no notes on the conversation we had on November—

Mr. Downing: Let him finish the answer.

Mr. Callaghan: He finished his answer.

The Court: No, he had not.

Mr. Callaghan: I beg your pardon.

By Mr. Callaghan:

Q. Do you want to say something else?

561 A. I say that on the interview of November 29, I made no notes.

Mr. Callaghan: Miss Reporter, you had that answer before?

The Court: And you started to ask a question before he finished?

Now, don't do that any more.

Mr. Callaghan: If your Honor please, I respectfully submit that the record will show that the answer is completely finished before I asked another question.

The Court: I made my ruling. Ask another question.

By Mr. Callaghan:

Q. Were Mehegan's notes typewriting or in longhand?

A. They were in longhand.

Q. Where did you examine those notes?

A. In our office at Room 2000, Bankers Building.

Q. Now, you have no independent recollection of that, until after you looked at Mehegan's notes?

A. I have a very vivid recollection.

Q. Of the entire conversation?

A. The entire conversation.

Q. But yet you spent how long looking at Mr. Mehegan's notes?

A. Probably four or five minutes.

Q. How long in conversation with Mehegan about it?

A. Oh, maybe five minutes.

Q. And how long with Mr. Downing discussing it?

A. You mean last week?

Q. Whenever you discussed it with him.

A. I discussed it with him probably, on, fifteen or twenty minutes.

Q. How long did you discuss it with him since this trial was begun?

A. Maybe five minutes; not any longer.

Q. Now, where did you get the picture of Marshall?

A. I received that from our Detroit office in the mail.

Q. Did you try getting a picture from the Police Department in Chicago?

Mr. Downing: Objection, your Honor. That is immaterial.

The Court: Sustained. He said where he got the one he showed him.

By Mr. Callaghan:

Q. When did you last see that picture?

A. I think it was probably last November, November 29. I don't recall seeing it—

Q. Was it a day or two before you talked to Gordon that you received that picture from your Detroit office?

A. I don't recall when I received it.

Q. Well, could you give us your best estimate of what month? Was it during July you received it?

Mr. Downing: Objection: The question is "What month during July?"

Mr. Callaghan: I mean "What month during 1950?" obviously. That is silly.

Mr. Downing: I object to that.

The Court: State when you received it.

By the Witness:

A. I don't recall exactly. I think it was sometime in August of 1950.

By Mr. Callaghan:

Q. Are you sure you didn't get that picture of Mr. Marshall sometime during the month of July, 1950?

A. I am not sure. I don't remember when it was. I think it was August.

Q. Now, did you have more than one picture of Marshall?

A. I believe there were several pictures. I don't know whether there were different poses or not.

Q. How many pictures did you show Gordon?

564 A. I showed him either one or two.

Q. You are not sure about that, whether it was one or two?

A. No, I am not.

Q. You are not even sure whether you had more than one, are you?

A. I am only sure that I had a picture of Marshall, which I showed to him.

Q. How was he dressed in the picture?

A. I don't recall.

Q. Did he have a hat on?

A. No, I don't believe so.

Q. Did he have on glasses?

A. I don't think so. I don't recall.

Q. You don't remember anything at all about his dress or the appearance of that picture?

A. I recall that I had a picture of Marshall that I showed to Gordon. I don't remember now how he was dressed, or whether he wore glasses.

Q. When did you last see that picture?

A. I think probably the last time I examined it was on that date, November 8, 1950.

Q. Do you know what you did with it then, Mr. McCormick?

A. It is in our file.

565 Q. In the Chicago office?

A. Either in the Chicago office or it has been returned to Detroit.

Mr. Callaghan: That is all.

The Court: Any questions, Mr. Walsh?

Mr. Walsh: Yes.

Cross Examination

By Mr. Walsh:

Q. Mr. McCormick, you talked to Mr. MacLeod at 215 East Erie Street that day, did you not?

A. On the same day, yes.

Q. November 8, 1950?

A. November 8, yes.

Q. Before you took him down to the FBI office?

A. That is right.

Q. And I assume you told him that anything he said might be used against him.

A. He was advised that he was entitled to an attorney, and that he didn't have to say anything.

Q. And were you alone up at 215 East Erie?

A. No, I was not.

Q. Was Agent Higgs with you?

A. Agent Higgs was with me.

566 Q. And were there many other Agents with him?

A. I believe there were two other Agents.

Q. Now, when you came down to Room 2000 in the FBI Building, or the Bankers Building over here, are you sure that only you and Agent Higgs were present?

A. No, Higgs and I conducted the interview. Special Agent Stefanak was present for part of the interview, and Special Agent Williams was—came in the room, I recall.

Q. Were there any other Agents present?

A. Those are the only two, other than Higgs and myself.

Q. Were there any stenographers?

A. No.

Q. Were there any stenographers over a partition or place where they could record this?

A. No, sir.

Q. Were there any mechanical contrivances to record it?

A. No, sir.

Q. Were you making notes as you talked to him?

A. Agent Higgs made notes of that interview.

Q. Now, as a matter of fact, didn't you say to him
567 at one time during that conversation—didn't you say these words, in fact:

"What is the matter, don't you even want to talk about the weather?"

A. I don't recall making that statement. I may have.

Q. Do you recall any Agent having said that to him?

A. No, I don't.

Q. Don't you recall, as a matter of fact, that he refused to answer any questions regarding the garage until he had seen his attorney?

A. No, sir.

Q. Now, what was the business conducted at 215 East Erie Street when you were there?

A. When I was there?

Q. Yes.

A. Special Agent Higgs—

Q. No. What business was going on there, being conducted there as part of the premises?

A. I don't know. It appeared to be a rooming house.

Q. Did you see a desk with pigeonholes for mail there?

A. I don't recall that.

Q. You wouldn't deny that there was one there?

A. No, there may have been.

Q. Now, did you show this picture of Marshall to
568 MacLeod, or was it done by another Agent?

A. I think Agent Higgs showed a picture of Marshall to MacLeod; I showed it to Gordon.

Q. And if you told us on direct examination that you showed it to him, you were incorrect to that extent?

A. I showed the picture to Gordon. I conducted the interview of Gordon, and Higgs conducted the interview of MacLeod, and I was present.

Q. As a matter of fact, nobody showed a picture of Marshall to MacLeod, isn't that the truth?

A. Agent Higgs showed a picture to him.

Q. Are you positive of that?

A. Positive.

Q. What time was it?

A. What time of day? It was about 11:45.

Q. How long was he there at your office?

A. From about 11:30 until 2:00 o'clock.

Q. Did you show him Swartz's picture?

A. No.

Q. Did anyone?

A. No.

Q. Now, when you were at 215 East Erie, you saw some lons there, didn't you, in a case?

A. I saw some boxes of nylons there.

Q. As a matter of fact, you took one, didn't you?

569 A. No, I didn't.

Q. Did some other Agent with you take one?

A. I believe so, yes.

Q. Did he leave any money for it?

A. I don't know whether he did.

Q. Did he give him a receipt for it?

A. I don't know.

Q. Has he ever returned it, to your knowledge?

A. I don't know.

Q. Now, one other point I want to straighten out.

You have been an Agent for how long?

A. Ten and a half years, since 1940.

Q. Before you entered on your immediate duties as an Agent, I assume you went to the FBI training school, did you not?

A. I did.

Q. And while there you were trained for a while as a witness, were you not?

A. No. No, I was not.

Q. Did you ever take part in mock trials or witness trials—

Mr. Downing: Objection, your Honor. This is immaterial.

The Court: Sustained.

570 Mr. Walsh: I want to show this man is an experienced person, trained in the law, and trained in

testifying, so that the remark he made on direct, to which we objected strenuously, was calculated.

Mr. Downing: I object.

The Court: The objection is sustained.

By Mr. Walsh:

Q. Well, now, you didn't prepare a statement and ask Mr. MacLeod to sign it?

A. No, I did not.

Q. Why not? Because you considered it unsatisfactory?

Mr. Downing: Objection as to why he didn't. That is immaterial.

The Court: Sustained.

By Mr. Walsh:

Q. Of course you gave him no copy of Agent Higgs' notes regarding that?

A. No.

Q. Have you examined Agent Higgs' notes?

A. Yes, sir.

Q. When?

A. I think it was Saturday.

Q. Prior to that?

571 A. I don't recall ever having looked at his notes before.

Q. Did you ever see any report that he had written from those notes?

A. Yes, I did.

Q. Well, are you the Agent in charge of assembling this case?

Mr. Downing: Objection. That is immaterial, your Honor.

The Court: Sustained.

Mr. Walsh: I want to show the special interest of the witness.

The Court: I sustain the objection.

Mr. Walsh: That is all.

IN THE UNITED STATES DISTRICT COURT

(Caption—No. 50 CR 641)

Before Judge Campbell and a Jury.

Monday, June 4, 1951,

2:00 o'clock p.m.

Court met pursuant to recess.

574 The Court: You may proceed.

Mr. Downing: Mr. Higgs.

WALTER M. HIGGS, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Downing:

Q. Will you state your name, please?

A. Walter M. Higgs, Jr.

The Court: Walter is the first name?

The Witness: Walter M. Higgs, H-i-g-g-s, Jr.

The Court: All right.

By Mr. Downing:

Q. What is your business or occupation?

A. Special Agent of the Federal Bureau of Investigation.

Q. How long have you been so employed?

A. About three years.

Q. At what office are you stationed?

A. Chicago, Illinois.

Q. And were you stationed at the Chicago office in July of 1950?

575 A. Yes, I was.

Q. Are you acquainted with the defendants Gordon and MacLeod on this matter?

A. Yes, I am.

Q. If you see them in the court room, will you point them out, please?

A. Mr. Kenneth Gordon seated there in the light suit (indicating), and Mr. MacLeod on the end there (indicating).

Mr. Downing: Let the record show that the witness identified the defendants Gordon and MacLeod in the court room.

By Mr. Downing:

Q. Directing your attention to Government's Exhibit 68 and 69, each marked for identification, I ask you to look at those, and I ask you if you have seen them before, please.

A. Yes, sir, I have.

Q. When did you first see those exhibits?

A. This exhibit marked 68 I first saw on the morning of July 11, 1950.

Q. Where were you at that time?

A. I was at the Interstate Motor Freight System, 1833 South Canal, Chicago, Illinois.

Q. Who, if anyone, gave that to you at that time?

576 A. This seal is No. 26894, and was given me by Mr. McGrath, the dispatcher at the Interstate Motor Freight System.

Q. And have you had that in your custody since that date?

A. Yes, I have.

Q. With respect to Exhibit 69, when did you first see that?

A. This seal is Exhibit No. 69, is Eastman Kodak seal 26895, the seal which I found.

Mr. Callaghan: I submit the witness was only asked when he last saw it.

The Court: Yes. Answer the question.

By Mr. Downing:

Q. When did you first see the exhibit?

A. I first saw this exhibit on the morning of July 11, 1950.

Q. And where were you at that time?

A. I was at the Interstate Motor Freight System, Interstate Motor Freight Trucking lot at 1833 South Canal, and I found this seal myself.

Q. Whereabouts on the property did you find that seal?

A. On the southeast corner of the parking lot.

Q. Who, if anyone, was with you at that time?

577 A. Mr. McGrath, the dispatcher of the Interstate Motor Freight System, was with me.

Q. Has that seal been in the custody of the FBI since that date?

A. Yes, sir, it has.

Q. Directing your attention to July 27, 1950, approximately 1:00 p.m., were you on duty at that time?

A. Yes, sir, I was.

Q. Where were you at that time?

A. About 1:00 p.m. on July 27 I was at the "Popular Mechanics," 200 East Ontario, on the third floor men's washroom.

Q. Is that in the City of Chicago?

A. Chicago, Illinois.

Q. Are you acquainted with 215 East Erie Street in Chicago?

A. Yes, sir, I am.

Q. Where is 215 East Erie Street in relationship to where you were, as you testified, at 200 East Ontario?

A. The building at 215 East Erie Street, the rear of that building is about forty or fifty feet from where I was stationed on that day.

Q. From where you were stationed at that time, what portion of the property at 215 East Erie Street could 578 you see?

A. I could see the entire west wall, and the entire south wall, which is the back of the building.

Q. Are you acquainted with the large double door at the rear of the property at 215 East Erie Street?

A. Yes, I am.

Q. Could you see that from where you were stationed?

A. Perfectly.

Q. About how far were you from that door?

A. Between 100 and 150 feet.

Q. Will you relate to the court and jury what you witnessed, if anything, at that time and place, with respect to the property at 215 to 217 East Erie Street, Chicago?

A. It was about 1:00 p.m. on July 27, 1950, when a 1950 Buick Riviera, with a bluish gray body and a dark blue top pulled into the alley beside 215 East Erie Street, and stopped a few feet inside of the alley, and a young man, the driver of the automobile, got out of the car and went to the front of the building, at 215 East Erie Street, and he wasn't gone perhaps more than a minute or two minutes at the most, and he returned, followed immediately by Mr. Kenneth MacLeod.

Q. That is the defendant MacLeod here in the court room?

A. Yes, Mr. MacLeod there (indicating).

The driver of the car got back in his car and pulled it on around in the alley, the alley being an L-shaped alley, he pulled around 215 East Erie at the rear, and left the car facing east just before the large garage door and Mr. MacLeod proceeded to the large garage door with the key, unlocked the lock, and opened the door, and I believe Mr. MacLeod made a few gestures to Mr. Marshall at that time—he was the driver of the car—he got out and Mr. Marshall and Mr. MacLeod went in the garage and perhaps they were in there a couple of moments, and then Mr. MacLeod drove the truck that was in that garage out into the alley, and Marshall backed his car into the garage, and the passenger in the car stood in the alley while the car was being backed into the garage.

Q. Have you identified, since that date, the two men that were in this Buick at that time?

A. Yes, I have.

Q. And who were those two men?

Mr. Callaghan: I object to that, if your Honor please, unless he shows how he made the identification, whether by hearsay or otherwise.

580 The Court: Overruled.

By The Witness:

A. I have become personally acquainted with both of the individuals who were on that particular car on that date; the driver was James Irwin Marshall, the owner of the automobile, and his companion was Albert Swartz of Detroit, Michigan.

By Mr. Downing:

Q. Did you see the license plate on the car at that time?

A. Yes, sir, I did.

Q. What was it?

A. 1950 Michigan, EM-9645.

Q. Now, with respect to the truck that you said was pulled out of the property there at 215 to 217 East Erie, what type of truck was that?

A. It was an old green panel Chevrolet.

Q. Was there any inscription on the car at that time, or the truck?

A. Yes, the door was marked, I believe, "F. White, 4111 South Pulaski."

Mr. Walsh: What was the number? Excuse me.

The Witness: 4111—4111.

By Mr. Downing:

581 Q. Approximately how long was the Buick backed into the big double door at the rear of 215 to 217 East Erie?

A. The Buick was not backed in there very long, probably five to ten minutes at the most.

Q. Then what happened?

A. The Buick pulled out of the garage and Mr. Swartz got back in the car and then Mr. MacLeod backed the truck back into the garage and closed the door, and locked it, and the Buick proceeded rather slowly, as if he didn't know just—

The Court: Never mind the "as if".

Mr. Callaghan: Objection.

The Court: Sustained.

By Mr. Downing:

Q. What did the Buick then do?

A. The Buick then left the immediate vicinity of the garage and proceeded to within about forty feet of where I was stationed at that time, and turned and went and exited out of the alley.

As he went past me I was able to see right in the window of the car, and he had the back seat full of cartons marked "Kodak".

Q. And where did Mr. MacLeod go at that time?

582 A. Mr. MacLeod, as I said, locked the garage door and came on back, walked around the building and back to the front of the building of 215 East Erie.

583 Q. After you saw the car proceed out of the alley, that is the Buick car proceed out of the alley, then what did you do?

A. I notified—

Mr. Callaghan: I object to this.

The Court: The conversation, yes.

Mr. Downing: He can tell, not any conversation, he can tell what he did.

Mr. Downing:

Q. What did you do? What did you next do to it?

Mr. Callaghan: I submit, if your Honor please not I

notified. That carries a conversation. To some act of his I have no objection, but notifies—

The Court: He can say he called. I don't want the subject.

Mr. Downing: There is no intention, I think your Honor, to bring out any conversation. It is merely the choice of words.

The Court: What he did.

By Mr. Downing:

Q. What did you do then?

A. I communicated the fact—

Mr. Walsh: I object to that.

584 Mr. Callaghan: I object to that.

The Court: You communicated with somebody?

By Mr. Downing:

Q. With whom?

A. With Agent Bruno Wilson of the FBI. I told him—

Q. Not what you told him. How did you communicate with him?

A. I communicated with him by walkie-talkie radio.

Q. Now, I show you—

By The Court:

Q. With Agent who?

A. Bruno Wilson.

The Court: Very well.

By Mr. Downing:

Q. I will show you photographs, government's exhibits 84, 85, 86, 87 and 88, each marked for identification, and ask you to look at those and ask you if you have seen them before?

A. Yes, I have.

Q. What relationship, if any, is there between the scenes illustrated therein and the location of the testimony about which you have just given?

Mr. Callaghan: That is objected to, if your Honor please. I object to the form of this question, letting
585 this witness try to state his conclusions about comparisons.

By The Witness:

A. Exhibit 84 is a photograph of the front of the building, 215 East Erie Street, and also this photograph shows the entrance to the alleyway which is the only way that you may enter.

Mr. Callaghan: I object to that.

Mr. Walsh: I object to that.

The Court: Overruled. The answer may stand.

By Mr. Downing:

Q. With respect to the alley illustrated therein, I ask you if that is the alley in which the Buick entered, as you have previously testified?

A. That is the same alley.

Q. With respect to Government's exhibit 85?

A. 85 is a photograph showing both 215 and I believe 221 East Erie Street, the property which I know about, Mr. MacLeod's rooming house.

Mr. Walsh: I object to that.

The Court: That may be stricken.

By Mr. Downing:

Q. Is that the property adjacent to the building identified as 215 East Erie?

A. Yes, it is.

586 Q. What is Government's exhibit 86?

A. 86 is a photograph made from the position where I was stationed at on the 27th of July, 1950, and it looks north and shows the entrance to the alleyway.

Q. Is that the same alley you have described as illustrated in Government's exhibit 84?

A. Yes, it is the same alley.

Q. With respect to Government's exhibit 87, what does that illustrate?

A. 87 is a photograph looking west in the alley at the rear of 215 to 217 East Erie Street.

Q. With respect to the large double door appearing in that photograph, I ask you if that is the door from which the truck was driven and into which the Buick was driven?

A. That is the same door.

Q. With respect to Government's exhibit 88, what does that illustrate.

A. That is a photograph also made from the position where I was stationed, on the 27th of July. It looks east into the same alleyway, shows the rear of 215 to 217 East Erie Street.

Q. By whom were those photos made?

A. I made these photographs myself.

Q. Do your initials appear thereon?

A. Yes, they do.

587 Q. By whom were those photographs developed?

A. These photographs were developed in my presence by Miss Gertrude Patch, a laboratory technician.

Q. Is she employed at the FBI?

A. Yes.

Q. As to each of those photographs, are they a true and correct representation of the property, 215 to 217 East Erie, at the time you took those photographs?

A. Yes, they are.

Q. On what date were these photos taken?

A. These were made the 26th of May, 1951.

Q. What date were they developed?

A. They were developed the same day.

Q. According to your recollection, do those pictures truthfully and correctly represent various portions of the building illustrated therein when you saw it on July 27, 1950?

A. Yes, they do.

Q. Directing your attention to the defendant MacLeod, are you acquainted with where he resides?

A. Yes, I am.

Q. What address is that?

A. He resides at 1150 North Lake Shore Drive, Chicago, Illinois.

588 Q. Have you had occasion to see him at that address?

A. I have.

Q. When?

A. On November 8, 1950.

Q. Who was with you at that time?

A. Special Agent Edward Dailey and William H. Williams of the Federal Bureau of Investigation.

Q. Were you on the inside of his residence at that time?

A. Yes, I was.

Q. Did you have a conversation with the defendant MacLeod at that time and place?

A. Yes, I did.

Q. Will you relate in substance what you said or what anyone else said, and what the defendant MacLeod said at that time and place?

Mr. Walsh: Are these all the persons who were present?

Mr. Downing: Yes.

By Mr. Downing:

Q. Have you mentioned everyone else who was present?

A. Mr. Dailey, Mr. Williams and myself and Mr. MacLeod.

Q. Will you relate the conversation as best you can recall in substance?

589 A. The substance of the conversation on the morning of November 8th when I went to Mr. MacLeod's place of residence was—had to do—

Mr. Walsh: I object to that, your Honor. Relate what he said.

By The Court:

Q. What did you say and what did he say?

A. I asked Mr. MacLeod—

Mr. Callaghan: May it be understood this conversation is limited as the others have been throughout the trial.

The Court: Certainly, to the defendant present and not to the other one.

By The Witness:

A. I asked Mr. MacLeod if his name was Kenneth MacLeod, to which he replied it was. I asked him if he lived there.

He said he did.

I then asked him to come along with us, that we wanted to speak with him. To which he agreed.

By Mr. Downing:

Q. Directing your attention to Government's exhibits 79, 80, 81, and 82, marked for identification, I will ask you to look at each of these exhibits and ask you if you
590 have seen those before?

A. Yes, I have.

Q. By whom were those photos taken?

A. These photographs were made by myself.

Q. On what date?

A. Three of them were made on the 26th day of May. This one was made on the 28th day of May.

Q. Which was the one that was made on the 28th of May?

A. No. 82.

Q. By whom were each of those photographs developed?

A. They were also developed by Miss Gertrude Patch, an employee of the Federal Bureau of Investigation, in my presence.

Q. Under your direction and supervision?

Q. At what address were those photographs taken?

A. These photographs were all made in the vicinity of 1150 North Lake Shore Drive.

Q. Is that at the residence where you had seen Mr. MacLeod, as you previously testified?

A. Yes, they are.

Q. Do each of those photos represent a true and correct representation of the property at 1150 North 591 Lake Shore Drive insofar as they are illustrated therein at the time you took these pictures?

A. Yes, they do.

Q. Will you explain the photograph, Government's exhibit 79, as to what that represents?

A. Exhibit 79 is a photograph of the rear of 1150 North Lake Shore Drive, looking south in the alley, which is the entrance of that address.

Q. Off of what street do you enter into the alley?

A. That is Division, East Division.

Q. Approximately how far is that from the corner of Division and Lake Shore Drive?

A. I would say it is about 90 or 100 feet.

Q. Which way, east or west?

A. That is west of Lake Shore Drive.

Q. Government's exhibit 80, what does that represent?

A. No. 80 is a photograph of the same address, 1150 North Lake Shore Drive, in the alleyway looking north.

Q. With respect to the smaller of the doors illustrated in that photograph, I will ask you if that is the entrance of where you visited the defendant MacLeod, on November 8th?

A. Yes, it is.

Q. With respect to Government's exhibit 81, what 592 does that represent?

A. Photograph 81 is a closeup photograph looking south at the rear of 1150 North Shore Drive, showing the entranceway into Mr. MacLeod's residence.

Q. Government's exhibit 82, what does that represent?

A. 82 is a photograph of the alley looking east, showing the corner of Mr. MacLeod's residence at 1150 Lake Shore Drive, showing a parking place just south of his residence.

Q. With respect to the first window appearing opposite the alleyway there, on Government's exhibit 82, I will ask you if you know that is the window in the residence of the defendant MacLeod's property?

A. Yes, it is.

previously testified to?

A. Yes, I have.

Q. On what date did you have that conversation?

A. It was the same day, November 8, 1950.

Q. Where did you have that conversation?

A. At the office of the FBI, in the Bankers Building, Chicago, Illinois.

Q. Who was present at that time, Mr. Higgs?

593 A. Special Agent McCormick and myself spoke with Mr. MacLeod, and Special Agent Stefanak was in momentarily and out of the room.

Q. As best you can recall, will you relate what the conversation was, identifying who said what?

A. We asked Mr. MacLeod for his full name.

He stated that his name was Kenneth J. MacLeod; that he lived at 1150 Lake Shore Drive. He told us that he was a partner—

Mr. Walsh: Is this in response to questions?

By Mr. Downing:

Q. This is what Mr. MacLeod said?

A. Mr. MacLeod told me—

Mr. Walsh: I would like to have what each of them said.

The Court: I think he is coming to it.

Mr. Downing: He is doing it as best he can, your Honor.

By Mr. Downing:

Q. Go ahead.

A. Mr. MacLeod told us that he was a partner in the operation of a rooming house at 215 to 217 East Erie Street, Chicago, Illinois. His partner in the operation of the rooming house was Kenneth Gordon. He said he was on-
594 ly operating that as a front for Mr. Gordon, because—

Mr. Walsh: I object.

The Court: What are you objecting to?

Mr. Walsh: He said it is, or did you ask him some questions?

By The Witness:

A. This was in response to the question of what his business was. He explained that he was a partner with Mr. Gordon at 215 East Erie Street and that further, that the reason he was a partner with him was Mr. Gordon was trying to rent that property. He could not obtain a

lease to it. The lease was obtained in his name, Mr. MacLeod's name.

Mr. Walsh: I move to strike the remark about "front". That was obviously a conclusion of the witness.

Mr. Downing: Just a minute.

By The Witness:

A. Those were his words.

By Mr. Downing:

Q. Did he use the words "he was a front"?

A. Yes.

Mr. Callaghan: I submit the witness should be advised not to take part in the colloquy between counsel and the Court.

595 The Court: Proceed.

By Mr. Downing:

Q. What else was said at that time?

A. He said in the operation of that rooming house at 215 to 217 East Erie Street he had possession and control of a garage located at the building marked 217 East Erie Street; that he had the—he had access to the property. He had the keys to the property. He pointed out—

Mr. Walsh: I object to this.

The Court: State what he said.

By Mr. Downing:

Q. State what he said.

A. Mr. MacLeod said the income from that property was divided one-third to Kenneth Gordon and one-third to MacLeod—I am sorry, two-thirds to Kenneth Gordon, because he said that was the nature of their partnership.

We asked Mr. MacLeod about film in the garage at the rear of 217.

Mr. Walsh: I suggest he can tell us what he said.

By The Court:

Q. What did you ask him?

A. I asked him if he had any film or if he knew
596 about any film in the garage at the rear of 217 East Erie Street. To which he replied he did not have any film back there. He never seen any film back there. If there had been any film back there he would have known it.

He said he had control of that garage and knew what was in the garage.

In connection with that I asked him about that truck which I mentioned previously.

He said yes, there was a truck in the garage. I believe he said it was a green Chevrolet truck also.

He said that that truck belonged to a man by the name of Frank White and that White had rented the garage for \$20 for a matter of a month. The truck remained there for about two or three weeks. The truck and the man disappeared and he don't know where any of them went.

We also asked Mr. MacLeod—

Mr. Walsh: I suggest that somebody asked the question.

The Court: Which one?

By Mr. Downing:

Q. Who asked it?

A. I did.

597 The Court: All right. Go ahead.

By Mr. Downing:

Q. Do you recall anything else that was said at that particular time?

Mr. Walsh: I object to that unless it relates to this matter that is at issue here.

The Court: You may answer.

By The Witness:

A. Mr. MacLeod concluded his remarks by saying that if he had known then, if he had known before what he knew at that time, he wished he had never met Mr. Gordon.

By Mr. Downing:

Q. Do you recall anything else that was said at that time?

Mr. Walsh: I object to this, unless it is related to the issue here.

The Court: He may answer.

Mr. Walsh: I assume the prosecutor knows what he is doing.

By Mr. Downing:

Q. Do you recall anything else that was said?

A. We spoke, spoke to Mr. MacLeod in regard to James Irwin Marshall and Albert Swartz and asked him if he knew an Albert Swartz from Detroit, Michigan, to 598 which he replied he did not.

I exhibited a photograph of James Irwin Marshall to Mr. MacLeod.

He said he had never seen or known anybody that looked like the photograph which I showed him.

Q. And do you recall anything else in that conversa-

tion that you had with the defendant MacLeod at that time and place?

A. No, I do not.

Q. Did Mr. MacLeod sign a statement at that time and place?

A. No, he did not.

Q. Was that the only conversation you have had with the defendant MacLeod other than the one in the morning of November 8th and the one about which you have testified?

A. Well, no. I met him briefly for about 5 minutes on the occasion, about three times after time. At that time in the Palmer House Hotel, I believe the conversation at that time—

Q. Was not relevant to this matter?

A. Absolutely not, just in passing.

Q. Other than that, that is the only time you have 599 had any conversation with the defendant MacLeod?

A. That is all.

Mr. Downing: At this time, if your Honor please, the Government would like to offer in evidence, Government's exhibits 68 and 69, Government's exhibits 79 to 82, and 84 through 88.

The Court: Very well.

Mr. Downing: They may cross examine.

The Court: I will hear any objections after the cross examination.

Cross Examination

By Mr. Walsh:

Q. Mr. Higgs, after you left 1150 Lake Shore Drive with Mr. MacLeod, where did you go?

A. We went directly from 1150 Lake Shore Drive to 215 East Erie Street.

Q. How long were you there?

A. We were probably there an hour or more.

Q. What time did you leave 1150 Lake Shore Drive that morning?

A. I would say close to 11 o'clock.

Q. Now, how many agents accompanied you to 215 E. Erie Street?

600 A. From 1150?

Q. Yes.

A. I believe two.

Q. That is, there were four of you in one automobile?

A. Four of us.

Q. Your automobile, a bureau car?

A. That is right.

Q. Did you all enter the premises at 215 East Erie?

A. No, we didn't.

Q. Who went in?

A. I went in with Mr. MacLeod, and I believe Agent Williams went in with us. Mr. Dailey remained outside.

Q. Now, what time of day was it when you saw him at the Palmer House?

A. About 10 or 10:30 in the morning.

Q. About 10 or 10:30 in the morning?

A. Yes.

Q. As a matter of fact, you had compelled him or requested him to let you take his picture while he was at the Bureau office that day, didn't you, the day before your meeting at the Palmer House? /

A. Compelled him to take his picture?

Q. Yes.

601 A. His photograph was taken while he was there.

Q. Were his fingerprints taken, too?

A. Yes, they were.

Q. As a matter of fact, you asked him to oblige you by meeting him at the Palmer House to initial this the next day, didn't you?

A. That is correct.

Q. Is that something that had been overlooked the day before?

A. Well, he was asked to do it and evidently he neglected to do so. He completed that, I think, the next day or second day after that.

Q. Well, was it the day following his appearance at the Bureau?

A. I think it was two days later.

Q. Two days later?

A. Yes.

Q. Did you ask him to sign them while he was there at the Bureau office?

A. Yes, I did.

Q. Did he refuse?

A. No, he did not refuse. I think he just overlooked it. Nobody saw to it, it was done at that particular time. So it got by without being done.

602 Q. I assume up in this third floor washroom where you were located on the 27th day of July you overheard no conversation between any parties in the alley?

A. No, I didn't.

Q. And how was this young man who went around to the front of 215 East Erie Street, how was he dressed that day?

A. He had on a white shirt, no tie, and what appeared to be brown checked trousers.

Q. He had a hat?

A. No hat.

Q. Was he the driver of the Buick?

A. Yes, he was.

Q. Now, the Buick drove into the alley, did it, from the north?

A. From the north, that is right.

Q. This Government exhibit 86 that I show you.

A. Yes.

Q. Will you show us where the car entered the alley?

A. The car entered the alley from this point here, pulled along to this point here, and parked, and the driver got out and went around the front of the building.

Q. Did you recognize the occupants of the car, as they drove in?

A. No, I didn't.

603 Q. Did you know either one of them when they came closer to you?

A. No, I did not.

Q. Did you recognize either one of them that day?

A. No, I did not.

Q. And now, Marshall was out of your view then when he walked around out of the street?

A. That is right.

Q. This young man whom you later identify as Marshall, is that right?

A. That is right.

Q. You have met him many times since then, or several at least?

A. Once or twice.

Q. How long was he gone?

A. Thirty seconds to a minute.

Q. Did MacLeod get in their car when he came out?

A. No, he did not.

Q. Did he walk around through the alley in your view?

A. He did.

Q. And through which door do you now say or did you say he entered the garage?

A. Through this large door here.

Q. Large door?

Mr. Downing: On Government's exhibit 87.

604 Mr. Walsh: On Government's exhibit 87.

By Mr. Walsh:

Q. Did you see him use a key?

A. Yes, I did.

Q. You saw him use a key?

A. Yes. He took a key from his pocket and unlocked the lock.

Q. And you saw him unlock the lock?

A. Yes.

Q. From your position, this alley runs in which direction?

A. This alley here runs east and west.

605 Q. And your position was where, with relation to east or west of this door?

Mr. Callaghan: May I look and see what he indicates, and it may save time?

The Court: Get behind him here.

By The Witness:

A. My position in relation to this door, I pointed out to you here now, and will also explain it.

By Mr. Walsh:

Q. Just tell me whether you were east or west of the door.

A. I was southwest of the door.

Q. Well, how far west?

A. Between 100 and 150 feet.

Q. How far south?

A. The width of this alley, which is probably 20, 25, 30 feet.

Q. But 100 feet west?

A. That is about right, 100 feet.

Q. And then which direction did this window from which you were looking—which direction did that window face?

A. The window faces north.

Q. And were you leaning out the window?

606 A. Yes, I was.

Q. Now, how deep would you say this inset is here between the alley and the door, the surface of the door?

A. The face of the door is six or eight inches.

Q. And is there a padlock?

A. There is.

Q. Is that the lock that is or was on the door?

A. I cannot testify as to that fact, but there was a lock similar to that.

Q. Did you examine the door closely at any time?

A. Yes, I have examined the door very closely.

Q. Well, on that date?

A. No, not on that date.

Q. Or just prior to it?

A. Just prior to it, I believe.

Q. And was it locked with a padlock?

A. Yes, it was.

Q. At the west end of the door?

A. The west end of the door.

Q. And in close to the corner formed by the right angle—the right angle corner formed by the inset and the door, right?

A. The lock would be about three or four inches 607 from the brick surface there.

Q. And you are sure now that you were able to see that from the window, that you were able to see the lock from the window, the third floor washroom window?

A. I won't say that I can see the lock from the window, but I could see the lock as he took it off, and I could see him take the key from his pocket and insert it.

Q. Now, how many people reside in this building at 1150 North Lake Shore Drive?

A. I do not know.

Q. More than Mr. MacLeod?

Mr. Downing: Objection, your Honor. It is immaterial. He says he doesn't know.

The Court: Well, if he knows it is more than he, he can answer, if he knows.

By Mr. Walsh:

Q. Let me refresh your recollection in this fashion: You have referred to it here for the benefit of everybody as the residence of Mr. MacLeod.

Now, how big is the building?

A. You mean the part occupied by Mr. MacLeod, or the entire—

Q. The entire building.

608 A. The entire building, I believe, is either three or four stories, and it occupies a lot probably 50 by 90.

Q. And does it consist of many apartments and rooms?

A. I wouldn't know. I have never been in it.

Q. Well, you went to Mr. MacLeod's apartment?

A. I have been in Mr. MacLeod's portion of the building, yes.

Q. What is it, a room or an apartment?

A. His portion of the building consists of about three or four small rooms which he told me he had built there himself.

Q. That he had built there?

A. Yes. He decorated and done all the work, built it out of the garage.

Q. He didn't build the building?

A. No, no, the interior.

Q. As a matter of fact, you are acquainted with the ownership and management of the building, aren't you?

A. At 1150 Lake Shore Drive?

Q. Yes.

A. Not to my knowledge.

Q. Well, you know, do you not, that Mr. MacLeod, doesn't run the building, that he is simply a tenant
609 there, don't you?

A. That is my impression merely. I didn't ask him.

Q. You know of nothing contrary to that?

A. No.

Q. Did you notice how many license plates there were on that car?

A. You are referring to the Buick, sir?

Q. Yes, sir.

A. I know that the automobile had a rear license plate, but I wouldn't swear that it had a front license plate.

Q. Well, is there any difference between the front and the back? Does that refresh your recollection in any respect?

A. To this extent, that I didn't notice any other license plate except the 1950 Michigan, EM-9645.

Q. And when the car drove into the alley, in the first place, I believe that is on Government's Exhibit 6—that is the alley?

A. Yes, sir.

Q. Did you see any license plate on it immediately when it drove in?

A. I do not recall noting the license plate when the car entered the driveway, because I had seen several automobiles come in there, and I didn't know that that car had 610 any connection with this case at that time.

Q. Now, did the car make a left turn when it reached the corners of the alleys?

A. Going out?

Q. Well, it drove into the alley and came south?

A. Right.

Q. And when it reached the end of the building, did it make a left turn?

A. Left turn is correct.

Q. And how far did it proceed?

A. It proceeded the width of the building at 215, there, and about probably a third of 217, and stopped just before the double door there.

Q. Did you make a note of the license plate then?

A. Yes, I did.

Q. Did you write it down?

A. I did.

Q. And was that the first time you saw a license plate?

A. That is the first time that I took definite notice of a license plate.

Q. Now, did it drive in? Was the car backed into the garage?

A. That is correct.

611 Q. Or did it drive in nose forward?

A. It backed in.

Q. Which of the three men drove the car?

A. The gentlemen whom I now know is Mr. Marshall, James Irwin Marshall.

Q. Now, did you note this door that is to the west of the two double garage doors?

A. This first door?

Q. Yes, as shown on Government's Exhibit 87.

A. Yes.

Q. That is not a car entrance door; that is just a pedestrian entrance door?

A. That is right.

Q. Does that door give entrance to the garage?

A. Of my own knowledge I cannot say that it does or does not, but I have been told that it does.

Q. Did you observe that there were persons living upstairs of the garage?

A. I am acquainted with one gentlemen who lives upstairs.

Q. You saw them enter?

A. Yes, I have seen them go and come.

Q. And now, did all three go into the garage?

A. No, only—

612 Q. When the door was opened?

A. Only Mr. MacLeod and Mr. Marshall.

Q. And this third man, you call him Swartz, stayed outside?

A. He stayed outside except for a brief moment he stepped inside the door between me and the Buick, the automobile that was backed in there. He stepped back out into the alley.

Q. Did you see him make any gestures?

A. I don't recall any particular action on the part of Mr. Swartz, no.

Q. Will you describe Mr. Swartz in appearance?

A. On that day he was wearing a blue gabardine sport outfit, a jacket and a pair of slacks, dark shoes, no hat, smoking a cigar, and he has a bald spot on the top of his head back here (indicating); and he is a man just over forty years of age.

Q. Describe Mr. Marshall as he appeared to you that day.

A. He was wearing a white shirt, no tie, brown or tan checkered slacks, no hat, and I recall that he had very curly wavy looking hair.

Q. Did he wear glasses?

A. No glasses.

613 Q. Did any of them wear glasses?

A. No glasses, no.

Q. Will you describe Mr. MacLeod as he was dressed that day?

A. Mr. MacLeod had on a white shirt, no tie, his collar was open, and he had on a pair of what looked like gray slacks that needed a little press.

Q. They needed a press?

A. Yes, he looked a little wrinkled like he probably had been working maybe, and well, of course, his facial characteristics were exactly the same as he is now.

Q. Now, as a matter of fact, in this conversation that

you had with Mr. MacLeod down at the office of the FBI, didn't he state to you that he did not desire to discuss the matter at all until he had seen counsel?

A. No, he didn't.

Q. Did you, or did any of the other Agents in your presence ask him if he was always this quiet?

A. Not to my knowledge.

Q. Did you or any of the Agents in your presence, either there or any of the places you were with him that day, ask him if he wasn't even willing to talk about the weather?

A. I don't recall those words, no. He talked quite
614 freely at 215 East Erie Street.

Q. Now, you didn't reduce his remarks to a written statement?

A. No, I did not.

Q. Well, who made notes of his conversation?

A. I did.

Q. You made them?

A. Yes, sir.

Q. Did you ask him to sign a statement?

A. At the conclusion of the interview we gave him an opportunity to. We asked him if he would like to.

Q. Asked him what, you said?

A. Asked him if he wanted to give us a statement of what he told us.

Q. He had talked to you quite a while from what you say, isn't that right?

A. That's right.

Q. How long?

A. From the time Mr. MacLeod on November 8 until I last saw him go out the door, probably over two hours.

Q. He wasn't arraigned and taken before a commissioner or arrested? You didn't arraign him as a result of this detention, did you?

A. On November 8 I believe he was arraigned, yes.
615 Q. On November 8?

A. Yes.

Q. Was his bail fixed?

A. I believe it was.

Q. For how much?

Mr. Downing: Objection, your Honor. That is a matter of record.

The Court: Sustained.

Mr. Walsh: Well, if your Honor please, he says now that he was arraigned, and yet he says he walked out the door.

The Court: I sustained the objection.

By Mr. Walsh:

Q. Well, how many places did you go with him that day?

A. I went from 1150 Lake Shore Drive—this is November 8 you are talking about?

Q. This is the day of these conversations that you have been talking about.

A. 1150 Lake Shore Drive, 215 East Erie, and 1900 Bankers Building, Chicago, Illinois.

Q. Did you have Mr. MacLeod's picture prior to that date?

A. Yes, I had some photographs of Mr. MacLeod.

616 Q. Did you have his picture in the fashion you wanted it taken that day, or in the fashion that you had it taken that day, a still-posed photograph?

A. No.

Q. But you had been taking pictures from your third floor window?

A. That's right.

Q. And did you have his finger prints on any form card of the Bureau?

A. I had never taken Mr. MacLeod's finger prints prior to November—

Q. If they existed, you didn't know about it?

A. No.

Q. Mr. MacLeod told you, I think you told us on direct examination—Did Mr. MacLeod tell you that he only received a third of the proceeds?

A. That is correct.

Q. Of the rooming house?

A. Yes.

Q. Are you sure that he didn't tell you that it was a half?

A. Mr. MacLeod said that he took one-third of the income, and the other two-thirds went to Mr. Gordon.

Q. Well, if I told you that your testimony disagreed 617 with that of Agent McCormick in that respect, who was present at these interviews, I take it?

A. Yes, he was.

Q. If Mr. McCormick tells us that Mr. MacLeod said one-half, is he wrong?

A. I would say that Mr. McCormick was wrong.

Q. Was there any conversation about the sale of jewelry and stockings at 215 East Superior?

A. East Erie.

Q. 215 East Erie.

A. There was, yes.

Q. Did you see any such merchandise there?

A. Yes, I did.

Q. Did you take any?

A. No, I did not.

Q. Did any of the other Agents in your presence take any?

A. Any jewelry?

Q. Any jewelry or any stockings.

A. I believe one of the Agents who came up there after we first went there—

Q. He was there while you were there, though?

A. He was there while I was there.

Q. Did he leave with you?

618 A. He left with me.

Q. He took some stockings with him?

A. I believe Mrs. Jones gave him a box or two or three—I don't know, but one box of nylon hose which he took with her permission.

Q. Did he pay for them?

A. No.

Q. Now, did you see any of the operations in the garage while these men were in the garage, from your window, on July 27th?

A. Inside of the garage? No, I did not.

Q. And all you know about it is that when the car came out—did the car come out and drive east towards your place, or west, rather, towards your position?

A. West towards my position.

Q. And was it about even with you when it arrived at the corner of the alley?

A. Almost, almost even with me, yes.

Q. And did you have your camera with you?

A. No, I did not at that time.

Q. But you did see film or cases marked "Film"?

A. I saw cases marked "Kodak".

Q. From your third floor window?

A. Right.

619 Q. How many of those cases did you see?

A. The back seat of that car was full to the window level, from the floor up to the window level, and I would estimate—

Q. Did you see?

A. That I saw.

Q. You could only see part of what was in the car, I take it?

A. That's right.

Q. How many were within your view?

A. About eight.

Q. And how many times did you see the word "Kodak"?

A. Three times, I believe.

Q. Three times you saw the word "Kodak" on these cases?

A. Yes.

Q. Now, you didn't see anything in the trunk of the car?

A. No, the trunk was closed.

Q. And you were on the third floor. Did you see anything taken off the truck?

A. No, I did not.

Q. Do you know who loaded the car, if it was loaded in the garage?

620 A. Mr. Marshall told me who loaded the car.

Q. Not what somebody told you. Not what somebody told you.

A. I did not see the car loaded.

Q. On this date that you met Mr. MacLeod at the Palmer House, did you again ask him to sign a statement?

A. No, I did not.

Q. As a matter of fact, you never asked him to sign a statement, did you?

A. I did on the occasion on which I previously testified.

Q. Is Mr. McCormick's memory faulty again if he told us that such and such question was not asked?

Mr. Downing: I object to that.

The Court: He may answer.

By the Witness:

A. If anybody said that Mr. MacLeod did not have the opportunity to sign a statement, they would be wrong.

Mr. Walsh: I move to strike that as not responsive.

The Court: The motion is denied.

By Mr. Walsh:

Q. I asked whether that question was asked, whether he was asked to sign a statement.

621 A. He was.

Q. By whom?

A. I asked him.

Q. In whose presence?

A. In the presence of Mr. McCormick.

Q. Where did this arraignment take place that you told us occurred? Which of the three places that you went to?

A. I only went with Mr. MacLeod to the places which I stated previously, and Mr. MacLeod was not arraigned at either of those three places.

Q. As a matter of fact, he was not arraigned, was he, that day?

A. It is entirely possible that he wasn't arraigned that day:

Q. Don't you know it, as a matter of fact?

A. Now that you have refreshed my memory, yes.

Q. Did you show Mr. Marshall or Mr. MacLeod a picture during your conversation at 215 East Erie?

A. Did I show him a photograph of 215 East Erie?

Q. Yes.

A. I believe I did.

Q. Whose photograph, or what photograph?

622 A. I believe the photograph was a photograph of Mr. MacLeod at the rear of 215 East Erie.

Q. Taken on another occasion, or on the same day?

A. What do you mean by that?

Q. Was it taken on November 8?

A. No, it was not taken on November 8.

Q. All right. Was it taken on July 27?

A. No, it was not.

Q. Was it taken after July 27?

A. I believe it was.

Q. How long after?

A. About four or five days.

Q. What was Mr. MacLeod doing?

A. He was removing cardboard cartons from the convertible Oldsmobile and taking them in the rear door at 215 East Erie Street.

Q. Were you still in the same place, the third floor window?

A. The same.

Q. Could you see what was on those cartons?

A. There were no marks on the side of those cartons.

Q. Was that the same carton that you saw on the 27th of July?

A. No, sir.

Q. Well, did you show him that picture to indicate 623 to him that he was under observation, and to frighten him into a statement?

Mr. Downing: I object to that remark.

The Court: Sustained. Would you care to rephrase your question?

By Mr. Walsh:

Q. Did you show him that picture simultaneously with the request that he tell you something?

A. No.

Q. Now, did you show him any other picture? Did you show him the picture of any other individual at that time and place?

A. Yes, I did.

Q. At 215 East Erie?

A. Excuse me now. I am understanding you now to say, did I show him another photograph at that time, meaning the interview?

Q. No. You told us that at 215 Erie, you showed him the picture of himself, is that right?

A. I wasn't at 215 East Erie when I showed him the picture.

Q. That is what I understood you to say. But where did you show him that picture?

A. I showed him the photograph at the time he was 624 interviewed in the FBI office in Chicago.

Q. Well, he was being interviewed at 215 East Erie wasn't he?

A. I spoke with him at 215 East Erie.

Q. And he was being interviewed at 1150 Lake Shore Drive, wasn't he?

A. I spoke with him briefly there also.

Q. Well, when is the first time you showed him a picture? Now, where were you?

A. In 1900, Bankers Building, Chicago, Illinois.

Q. 1900?

A. Right.

Q. Not 2000?

A. Well, if you want to be technical about it, I think it was 2019.

Q. Well, is that the nineteenth floor or the twentieth floor?

A. The twentieth floor.

Q. Now, what picture did you show him first?

A. I believe I showed him a photograph of himself removing a cardboard carton from a convertible Oldsmobile, and taking it into the rear door.

Q. A convertible Oldsmobile?

A. Right.

625 Q. What color was the Oldsmobile?

A. Maroon.

Q. What was on that package?

A. Nothing. There were no marks on it.

Q. If there were, you didn't see them?

A. No, sir.

Q. And nothing indicating "Kodak" in any amount?

A. No.

Q. What other picture did you show him at that time?

A. I think the only photographs exhibited to Mr. MacLeod on that occasion were a series of photographs made of him removing the cartons from that automobile.

Mr. Walsh: That is all.

The Court: Do you have any questions.

Cross Examination

By Mr. Callaghan:

Q. ~~Mr.~~ Witness, will you look at Government's Exhibit 84, and can you point out where you were on that day, July 27th? Does it show in that picture?

A. If this fire escape were removed, you would be able to see right behind. You can see the ledge right through the steps.

Q. You were on a building at the window on the 626 extreme righthand of the—that window looking from the third floor.

A. On the third floor.

Q. Is that correct?

A. Correct.

Q. Does that building set back of that alley?

A. Yes, it does.

Q. By "that alley" I mean the alley that runs east and west back of 215 East Erie Street.

A. That is correct.

Q. You said in response to one of Mr. Walsh's questions that you were the width of the alley westward—

A. South.

Q. Southward from which the picture was taken, and 150 feet to the west?

A. About 100 or 150 feet west, and the width of the alley south.

Q. Well, at the point of this building, there is a retaining wall, or a wall to separate that parking space back of the adjoining building, is there not?

A. There is.

Q. Now, that building drops back there, does it not, about 40 feet, where there is a dock of the American Express Company?

627 A. The dock may be 40 feet back, but the building up here is not that far back.

Q. How far is the building from the alley?

A. Less than the length of an automobile.

Q. So that you would then be southward from your point of picture taking, the width of the alley plus the distance where an automobile could pull in to back in to that dock?

A. No, I don't think—I don't understand what you are trying to say to me, no.

I might attempt to explain it to you, if you would like me to.

Q. Well, I think the only picture that shows that is this Exhibit 4, Mr. Witness, of the alley that runs east and west.

A. Yes, sir.

Q. It runs westward beyond the north-and-south alley, doesn't it? And there is a space in this area that is not shown in this picture?

A. That is right, a loading dock here.

Q. About 75 by 75 feet, roughly?

A. 50 by 50.

Q. All right.

Now, the alley proceeds westward about 50 feet, 628 and there is also a drop-back from the alley to this loading dock at the American Railway Express Company, isn't there?

A. There is.

Q. Was this picture, Government's Exhibit 88—

A. Yes, it was; it is.

Q. I have not asked a question yet.

Was this picture, Government's Exhibit 88, taken from the third floor premises of "Popular Mechanics Magazine"?

A. It was.

Q. Who was with you on July 27th in this washroom on this floor?

A. Nobody. I was alone.

Q. Did you have a camera with you at that time?

A. No, I didn't, not at that time.

Q. Was this film known as Government's Exhibit 88 taken with a telescopic lens?

A. No.

Mr. Callaghan: That is all.

The Court: Do you have any redirect?

629

Redirect Examination

By Mr. Downing:

Q. With respect to the photographs shown to Mr. MacLeod on November 8, you did show Mr. MacLeod, I believe you testified, that you showed Mr. MacLeod a photograph of himself in one instance, is that right?

A. That is right.

Q. Did you also show him a photograph of James Irwin Marshall?

Mr. Walsh: I object to this.

The Court: Overruled.

By the Witness:

A. I did show him a photograph of Mr. Marshall.

By Mr. Downing:

Q. Now, with respect to the car exhibited or shown in the photograph, wherein Mr. MacLeod was removing a carton from an Oldsmobile, do you know whose Oldsmobile that is?

A. That is Mr. Kenneth Gordon's car.

Mr. Downing: That is all.

The Court: Is there any recross?

Mr. Callaghan: No recross.

The Court: Do you have anything else to offer?

630

Recross Examination

By Mr. Walsh:

Q. Did you make notes of your interview with Mr. MacLeod?

Mr. Downing: Objection. That is not proper recross.

The Court: Objection sustained. It is not proper recross. Confine yourself to what was asked on redirect.

By Mr. Walsh:

Q. When you showed this picture of Marshall to Mr. MacLeod in the office of FBI, Chicago, Illinois, one of you discussed this case with Mr. McCormick?

Mr. Downing: I object to that.

The Court: Sustained.

By Mr. Walsh:

Q. Well, can you explain your failure to tell us about Marshall's picture on cross examination?

Mr. Downing: I object to that, if your Honor please, to the form of the question.

The Court: Sustained.

By Mr. Walsh:

Q. Have you and Mr. Downing discussed this case?

A. Yes, sir.

631 Q. And your testimony?

A. Yes, sir.

Mr. Walsh: That is all.

Mr. Downing: That is all.

The Court: We will take a recess for ten minutes.

(Recess taken.)

632 The Court: You may proceed.

Mr. Downing: Your Honor, please, there is an offer pending.

The Court: I had not ruled on that.

Mr. Downing: 68 and 69, the two seals, and the photographs, Government's exhibits 79 through 82, and 84 through 88.

The Court: Any objections?

Mr. Callaghan: I have no objections to the documents which have been identified here as Government's exhibits 84 to 88.

The Court: Have you any?

Mr. Walsh: No, none to the photographs.

The Court: 84 to 88 are received in evidence.

(Which said photographs so offered and received in evidence, were marked Government's exhibits Nos. 84 to 88, both inclusive).

The Court: Have you objections to the other?

Mr. Callaghan: To 79, 80, 81, and 82, I object on the ground that they have not been properly qualified for admission as exhibits, the witness having testified the pictures were taken on May 28, 1951. The other grounds are a foundation not having been properly laid for the introduction of these photographs.

633 The Court: In what regard was the foundation not properly laid?

Mr. Callaghan: All he testified to the pictures were taken on May 28th, 1951. That is all there is in the record.

Mr. Downing: As to one of the photographs that is true, as to number 83. As to Government's exhibits 79, 80 and 81, the pictures taken, Marshall identified each of the photographs as photographs representing the place where in he obtained a load of this film on the 22nd of January, 1950.

The Court: July.

Mr. Downing: The 22nd of July, that is right, your Honor.

Mr. Walsh: That is on the 22nd?

Mr. Downing: That's right.

Mr. Walsh: I don't have anything to do with any of that.

Mr. Callaghan: To these seals, I have no objection to the Government's exhibits—

Mr. Downing: 68 and 69?

Mr. Callaghan: 68 and 69.

The Court: 79, 80, 81 and 82 are the same as the ones shown Marshall?

634 Mr. Downing: That is right.

The Court: Objections overruled. They may be received in evidence.

(Which said photographs so offered and received in evidence, were marked Government's exhibits Nos. 79, 80, 81, and 82.)

The Court: Any objections to the two seals?

Mr. Callaghan: No. 68 and 69.

The Court: 68 and 69 received in evidence.

(Which said objects, so offered and received in evidence, were marked Government's exhibits Nos. 68 and 69.)

BRUNO W. WILSON, called as a witness on behalf of the Government herein, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Downing:

Q. Will you state your name, please?

A. Bruno W. Wilson.

Q. What is your business or occupation, Mr. Wilson?

A. I am a Special Agent for the Federal Bureau of Investigation.

Q. How long have you been so employed?

A. Five years.

635 Q. At what office are you now stationed?

A. Chicago.

Q. Were you so stationed in the Chicago office in July of 1950?

A. I was.

Q. Directing your attention to July 27, 1950, at approximately 1:30 p.m., were you on duty on that day?

A. I was.

Q. Where were you at that time?

A. I was in the vicinity of 215 East Erie St., Chicago.

Q. Will you relate to the court and jury what, if anything took place at or about that time on July 27, 1950?

A. At about 1:48 p.m. in the afternoon, a Buick, 1950 two-tone Buick, with a Michigan license, E.M. 9645 came out of the alley adjacent to 215 East Erie. This automobile proceeded east on Erie Street to Fairbanks Street, turned south on Fairbanks Street to Ohio Street. On Ohio it turned west to Michigan and then proceeded south on Michigan to Jackson Blvd. On Jackson Blvd. it turned east again to Columbus Drive and then turned south on Columbus Drive, then turned south on Columbus Drive. Columbus Drive runs into the outer drive and this car proceeded down to the outer drive to Jeffry Blvd. It continued south on Jeffry Blvd. to 95th Street.

636 At that point, 95th Street is U. S. Routes 12 and 20.

This car stayed on U. S. Routes 12 and 20 until a point just beyond Michigan City, Indiana, at which time it turned off on Route 112 and proceeded on 112 at a pace of probably 15 or 20 miles an hour, and then stopped at a restaurant on the right hand side of the road.

Q. Did the occupants of the car get out at that time?

A. They did. They went into a restaurant.

Q. Approximately how long were they in the restaurant at that time?

A. They were in the restaurant about 15 minutes.

Q. Thereafter, did they then come out and re-enter the car?

A. They did.

Q. Then what happened?

A. The car then proceeded on route 112, at which point there are several hills, oh, 3 or 4. I followed this car for about 1 mile, when I got stuck behind a truck and lost the car.

Q. In the vicinity of what car were you at that time?

A. It was Buchanan, Michigan, where they stopped in the restaurant. It was Niles, Michigan where I lost 637 the car.

Q. Approximately what time of the day did you last see the car?

A. About 3:50 p.m. in the afternoon.

Q. That was in Michigan, between Buchanan and Niles, is that right?

A. Yes.

Q. How many people were in the car?

A. Two.

Q. Were there two from the time you first saw it until the time you last saw the car?

A. Yes.

Q. Have you since determined the identity of the occupants of the car?

A. Yes, James Marshall and Albert Swartz.

Q. Which of the two was driving the car?

A. James Marshall.

Mr. Downing: You may cross examine.

The Court: Do you have any questions?

Mr. Callaghan: No questions.

Mr. Walsh: One question.

The Court: Very well.

Cross Examination

By Mr. Walsh:

Q. Did you see anyone else in the car besides the 638 people?

A. Yes. There were boxes in the back of the car.

Q. Were you able to see anything? Was there anything written on them?

A. I didn't pay that much attention. I wasn't too close to them too often.

Q. Well, when it was parked at the restaurant, you had an opportunity?

A. No, sir, my car was parked across the street in a filling station.

Q. In a filling station?

A. Yes.

Mr. Walsh: That is all.

The Court: Any redirect?

Mr. Downing: No, that is all.

The Court: Step down.

(The witness excused.)

Mr. Downing: Mr. Transeth.

NORMAN S. TRANSETH, called as a witness on behalf of the Government herein, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Downing:

639 Q. Will you state your name, please?

A. Norman S. Transeth.

Q. What is your business or occupation, Mr. Transeth?

A. I am a special agent of the Federal Bureau of Investigation.

Q. How long have you been so employed?

A. Approximately 4 years.

Q. In what office are you employed?

A. Detroit, Michigan.

Q. Were you employed in the Detroit office in July of 1950?

A. Yes, sir.

Q. Directing your attention to July 27, 1950, in the course of your duties, did you have occasion to observe an automobile bearing a 1950 Michigan license?

Mr. Callaghan: I object to counsel leading the witness. Let him testify to what he saw. He has no right to give him the information about which he is to testify.

The Court: Overruled.

Mr. Walsh: It is both leading and suggestive.

The Court: Overruled. Go ahead with the question.

By Mr. Downing:

640 Q. Did you have occasion to discover an automobile bearing a 1950 Michigan license, E.M. 9645?

A. Yes, I did.

Q. Where were you when you first saw the car?

A. I was at the intersection of U. S. Highway 12 and Highway 17, located just west of Ann Arbor, Michigan.

Q. Approximately what time of the day was that?

A. That was shortly before 7 o'clock. I would say about 10 minutes to 7.

Q. Will you describe the car please?

A. It was a 1950 Buick Riviera, two-tone in color, dark blue top with a gray bottom.

Q. How many occupants were in the car at that time?

A. Two.

Q. Who was with you, if anyone, at that time?

A. Agent William Sullivan.

Q. Is he an Agent of the FBI?

A. Yes, sir.

Q. Now, did you thereafter have occasion to follow the car after you first saw it?

A. Yes, sir, I did.

Q. Then, will you describe what the car did after you first saw it, and what you did?

A. At about 10 minutes to 7 this car came down the road from a westerly direction and was traveling in an 641 easterly direction, that is, from the direction of Chicago and towards Detroit.

We followed the car through Ann Arbor, Michigan and on U. S. 12 towards Detroit. Just before we got to Plymouth, Michigan, this 1950 Buick Riviera stopped at a service station for gasoline and we drove on by. As we drove on by we saw both the driver and the other occupant of the car get out.

Q. Approximately how long was the car stopped there?

A. About 10 or 15 minutes. We drove down the road, turned around, and came back. As we came back we again saw these two men standing near the car.

Q. Have you had an opportunity to identify the occupants of the car?

A. Yes, sir, I have.

Q. Will you tell the court and jury who the occupants of the car were at that time and place?

A. James Marshall and Al Swartz.

Q. Then, after the individuals got back into the car, then what happened with respect to this Buick?

A. We surveilled the Buick right into Detroit, and followed them to the vicinity of Sturtevant and Broad Street, in Detroit.

Q. When you last saw the car were the same two men in the car?

642 A. Yes, sir, they were.

Q. To your knowledge at the time that you last saw them at the place you have indicated, did either James Marshall or Albert Swartz live in the vicinity where you last saw the car?

A. Yes, sir. Al Swartz lived in that vicinity.

Q. Approximately what time in the evening was it that you last saw the car?

A. It was about 8:15.

Q. And was that the last you saw the car on July 27, 1950?

A. Yes, sir, it was traveling east on Sturtevant.

Q. Directing your attention to Government's exhibit 90, marked for identification, I ask you to look at that and ask you whether you have seen it before?

A. Yes, sir, I did.

Q. By whom was that prepared?

A. This is my handwriting.

Q. And when was that prepared?

A. On July 28, 1950.

Q. That is the date that the document bears in the upper right hand corner of the document?

A. Yes, sir.

Q. Where were you at the time this was prepared?

643 A. I was at Marshall's jewelry store in Ferndale, Michigan.

Q. Is that the jewelry store of James Irwin Marshall, the one you saw in the Buick, you have previously testified to?

A. Yes.

Q. At that time will you tell what took place in connection with the preparation of Government's exhibit 90?

A. We went down into the basement of the jewelry store. By we, I mean myself, Agent William Sullivan and Agent Henry Schutz. And at that time there was some cartons or boxes of film there and I made an inventory at that time concerning the film. Agents Sullivan and Schutz sorted and piled the film up and read the numbers off of the cartons or boxes, at which time I wrote the description of the film down on this piece of paper.

Q. That is the paper that you have in front of you upon which you transcribed the information which was called off to you, is that right?

A. Yes.

Q. At that time did you see the cartons and check the numbers that were recorded on there?

A. Yes, sir, I did.

Q. With respect to the cartons that were present at 644 Marshall's store at that time, were they initialed, initialed in your presence by Agents of the Federal Bureau of Investigation?

A. Yes, sir, they were.

Q. Does your signature appear on the face of Government's exhibit 90 that you have in front of you?

A. Yes, it does.

Q. With respect to that signature, is that the signature first appearing on the first page of Government's exhibit 90?

A. Yes, sir.

Q. Has that document been in the custody of the Federal Bureau of Investigation since that date?

A. Yes, sir.

Mr. Downing: At this time, if your Honor please, I would like to offer in evidence, Government's exhibit 90, and they may cross examine.

The Court: I will hear them on it after cross examination. You may proceed.

Cross Examination

By Mr. Callaghan:

Q. Mr. Witness, what kind of a car were you driving on this day?

A. I was driving a 1950 Ford.

646 Q. Were you driving or was your partner driving? Sullivan, I believe you said his name was?

A. Yes, sir. I think I was driving part of the time and he was driving part of the time.

Q. While you were following this car, did you get out and change drivers?

A. No, sir.

Q. What part of the time were you driving?

A. I don't exactly recall that.

Q. Who was driving when the car first came in your view?

646 By Mr. Callaghan:

Q. Were you driving the car at the time this car first came into view?

A. I believe Agent Sullivan drove.

Q. Where did you change drivers?

A. I do not recall whether we changed or where we changed.

Q. Or whether you changed? Do you know whether you did change?

A. We changed drivers at Ann Arbor, Michigan. I think I drove the car to Ann Arbor, Michigan.

Q. You drove it from Detroit to Ann Arbor?

A. Yes.

Q. I am talking from the beginning of the time you first had this car under observation, who was driving at that time?

A. Agent Sullivan.

Q. Did he drive all the way into Detroit or did you change drivers again between Ann Arbor and Detroit?

A. I believe that Agent Sullivan drove all the way.

Q. How many miles is that?

A. Approximately 35.

Q. What time of night was it when you first saw this car?

A. About 10 minutes to 7 in the evening.

647 Q. Was it dark?

A. No, it was daylight, bright daylight.

Q. That is ten minutes to seven, Eastern Time, is that right, at Ann Arbor?

A. That is the time that Detroit is on, yes.

Q. That is Eastern Time?

A. I believe it is.

Q. Was the sun still shining?

A. Yes, sir, it was.

Q. What time was it when you got into Detroit?

A. Shortly after 8 o'clock.

Q. How long after?

A. I would say about, we reached the outskirts of Detroit perhaps a quarter to eight.

Q. What time was it before you got over around Sturtevant Avenue?

A. At 8:15 we last saw the car.

Q. How close did you get to this car at any time while

you were following it?

A. Well, I would say we were right behind it at times and opposite it at other times.

Q. Right behind it, that is only a short distance away from it?

A. Yes.

Q. And at other times there were cars that intervened between you and it as you traveled along?

A. That is right.

Q. Did you see Swartz get out of the car?

A. Yes, sir, I did.

Q. Did he get out in front of his house or in the back of his house?

A. I am talking about now when they got out at the gasoline station.

Q. Well, you and I misunderstand each other, Mr. Witness. I am talking about when you got to Sturtevant Avenue, now.

A. O. K.

Q. You saw the car stop somewhere on Sturtevant Avenue, did you?

A. No, I did not.

649 Q. Did you follow the car until it got to Swartz's house?

A. No, I did not.

Q. How far were you from Swartz's house when you ceased to follow the car?

A. Two blocks.

Q. So you didn't observe where it went when it got to his address on Sturtevant Avenue?

A. No, I did not.

Q. Was it still daylight at 8:15?

A. Yes, it was.

Mr. Callaghan: That is all.

Cross Examination

By Mr. Walsh:

Q. You knew that Swartz lived there at that address prior to this, prior to the time you followed the car there?

A. Yes, sir, I did.

Q. And had you followed that car towards Chicago earlier in the day?

A. No, sir, I did not.

Q. Did other Agents with whom you were in communication do so, do you know?

650 A. I don't know whether they did or not.

Q. Was your car equipped with radio?

A. Yes, sir, it was.

Q. And it was by means of radio communication that you picked him up at Ann Arbor, or wherever you picked him up? Where did you pick the car up?

A. At the intersection of U. S. Highway 12 and 17.

Q. And that is near what city?

A. Ann Arbor, Michigan.

Q. Will you describe that automobile in a little more detail than a 1950 Riviera Buick? What is a Riviera?

Mr. Downing: Objection, your Honor.

Mr. Walsh: We have heard a lot of discussion about it.

The Court: Describe the car.

By Mr. Walsh:

Q. It has four wheels; how many doors?

A. A Riviera is a hard topped Buick. By that, it has the appearance of a convertible. This particular car had white sidewall tires. A Riviera means that it is a two-door Buick.

Q. A two-door?

A. Yes, sir.

Q. Did you notice whether it was a Special, a Super, or a Roadmaster.

651 A. It was a Roadmaster.

Q. Now, with regard to the license number, what did you say it was?

A. EM-9645.

Q. And you say you saw it that day, did you?

A. Yes, sir.

Q. And which end of the car did you see it on?

A. From the rear.

Q. Is that the only plate that was on the car?

A. That is the only plate that I saw.

Q. As a matter of fact, Michigan issues only one plate to a car, isn't that right?

A. Yes, they do.

Q. And did you yourself ever check the registration of that license number?

A. No, I did not.

Q. Well, has anyone told you to whom it was registered—

Mr. Downing: Objection.

The Court: Sustained.

By Mr. Walsh:

Q. The film on this Government Exhibit 90 for identification, or the film that is listed here, the only film that you seized during that period?

652 A. That is the only film I saw, yes.

Q. And only three kinds, or do you recall?

Mr. Downing: Your Honor, the document speaks for itself.

By Mr. Walsh:

Q. Sir?

A. I would have to look at that inventory to tell.

Q. Was a copy of this given to Mr. Marshall?

A. I don't think a copy of that detailed inventory was ever given to Mr. Marshall.

Q. Was one prepared?

A. Yes, sir.

Q. And then after you prepared the original and copy, you took the film and both copies, and what did you do?

A. I misunderstood you. I don't think an original and duplicate of that particular document there was ever prepared.

Q. This was copied later on, you mean?

A. That was a document which was prepared at the time the film was taken.

Q. And not in duplicate and copies?

A. No, no copies or duplicates.

Q. What did you do with the film?

A. Took it from Marshall's jewelry store in Ferris-
653 dale, Michigan, to the Detroit FBI office.

Q. Were these cartons all full?

A. I think there was one or two that was short one or two boxes of film.

Q. Now, after you followed this car to Sturtevant, you went to the vicinity of Sturtevant and what?

A. Sturtevant and Broad Street.

Q. That is in the Detroit city limits, or is it a suburb?

A. Yes, sir, Detroit city limits.

Q. You watched Swartz go to his home. Did you watch Swartz go to his home?

A. No, sir, I did not.

Q. Well, what is his address?

A. 4030 Sturtevant.

Q. How far is that away from the place that you drove to?

A. About two city blocks.

Q. Did you follow the car any farther after that night?

A. No, sir.

Q. That is the last you saw of it?

A. Yes, sir.

Q. And it is the next day, the 28th, that you received this merchandise from Mr. Marshall?

A. That's right.

Mr. Walsh: That is all.

The Court: Is there any redirect?

Mr. Downing: No redirect.

The Court: That is all. You may step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Downing: May I have a ruling on Government's Exhibit No. 90?

Mr. Walsh: I object to it, your Honor, on the ground it is self-serving and has the same effect about, as an FBI report. Obviously it is a document which an agent has made up and in which he describes an action which he performed.

Now he has testified about it, and it would be the same thing as having him give a written report of the surveillances they conducted.

Mr. Callaghan: I want to make my objection at the same time, and I will be still.

I make the same objection that Mr. Walsh makes except that it is simply a recapitulation of the testimony of the witness, or an attempt to corroborate the testimony of the witness by now putting in writing what he said orally from the witness stand.

The Court: That's right, except it lists the lot numbers and cartons.

Mr. Downing: That's right, and has the details that nobody could memorize. It is material to the lawsuit.

Mr. Walsh: This would be the equivalent of sending a note, recapitulating part of the evidence and emphasizing or reemphasizing it.

The Court: I think it is an inventory of the articles they took out of this, bearing the carton numbers and the lot numbers. As such it is admissible.

Mr. Walsh: If it please your Honor, other witnesses here have testified to transactions in connection with numbers and lots, and in some of the cases that they saw and of the things that he had records of and didn't even put the records in that they had with them—

The Court: If this weren't so involved, I wouldn't permit this in either, for the very reasons you point out, but since there were so many cartons and they bore different serial numbers, it would be impossible for a witness to memorize all of them—that is assuming that the witness has limited intelligence of the court—

Mr. Downing: And counsel.

The Court: The objection is overruled, and 90 will be received in evidence on behalf of the Government.

(Whereupon said document, so offered and received in evidence, was marked Government Exhibit 90.)

WILLIAM A. SULLIVAN, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Downing:

Q. Will you state your name, please?

A. William A. Sullivan.

Q. What is your business or occupation?

A. I am a Special Agent of the Federal Bureau of Investigation.

Q. How long have you been so employed?

A. Over three years.

657 Q. What office are you stationed in?

A. Detroit, Michigan.

Q. Were you in the Detroit office in July of 1950?

A. I was.

Q. Directing your attention to July 27, 1950, were you on duty on that date?

A. Yes, sir.

Q. In the course of your duties on that date did you have occasion to observe a 1950 Michigan license—

Mr. Callaghan: That is objected to as leading and suggestive.

The Court: The same ruling. Overruled.

By Mr. Downing:

Q. 1950, EM-9645.

A. I did.

Q. Where were you when you first saw that car?

A. At the intersection of U. S. 12 and Michigan 17.

Q. Will you describe the car as you saw it on that date?

A. It was a 1950 Buick, two-tone in color, a dark blue top and a light gray body.

Q. And who was with you at that time?

A. Special Agent Norman Transeth.

Q. At the time you first saw the car, how many
658 people were on the inside?

A. Two.

Q. Approximately what time of the day was that?

A. That was at 6:50 p.m., approximately.

Q. Did you thereafter have occasion to follow the car?

A. Yes, sir.

Q. Describe what you saw and did on that day, at that time, from commencing with following the car on that date.

A. We observed this car proceeding—

Mr. Walsh: I object to what "we observed."

By The Witness:

A. (Continuing) I observed this car proceeding east on U. S. 12.

We followed the car through Ann Arbor, Michigan, in the direction of Detroit, remaining on U. S. 12.

Approximately eight miles out of Ann Arbor, Michigan—that is, east of Ann Arbor—the car pulled into a service station. We passed the car while it was parked at the service station getting gasoline, and both occupants were out of the car. We drove approximately a quarter of a mile east on U. S. 12, turned around and drove back by
659 the filling station again.

The occupants were still standing outside of the car talking to each other.

We drove approximately a quarter of a mile west, turned around and parked, waiting for the car to pull out.

By Mr. Downing:

Q. How long did you wait before the car pulled out?

A. Oh, approximately ten to fifteen minutes.

Q. Now, have you had an opportunity to identify the occupants of the car?

A. Yes, sir.

Q. And who were the occupants of the car at that time and place?

A. Mr. James Marshall and Mr. Albert Swartz.

Q. And thereafter when the car pulled out of that place, what took place?

A. We followed that car on U. S. 12 into Detroit, Michigan. We followed it to the vicinity of Broad Street and Sturtevant.

Q. And what time was that, approximately?

A. That was approximately 8:15 p.m.

Q. When you last saw the car, was that at the intersection of Broad and Sturtevant Street in Detroit, Michigan?

A. Yes, sir, the car was turning east on Sturtevant Street.

Q. Heading east on Sturtevant, is that right?

A. That's right, sir.

Q. And were the same two men in the car at that time when you last saw the car?

A. Yes, sir.

Q. To your knowledge, at that time did either James Marshall or Albert Swartz live in the vicinity of where you last saw the car at Broad and Sturtevant Street in Detroit, Michigan?

A. Mr. Swartz lived at 4030 Sturtevant Street.

Q. Directing your attention to Government's Exhibit 90 in evidence, I ask you to look at that and I ask you if you have seen that before.

A. Yes, sir.

Q. I ask you if your signature appears as the second signature on that document?

A. Yes, sir.

Q. And I ask you if your signature was affixed thereto on July 28, 1950, the date that the document bears.

A. Yes, sir.

Mr. Downing: You may cross examine.

661

Cross Examination

By Mr. Callaghan:

Q. When did you last discuss your testimony with Mr. Transeth?

A. When we made our notes on this surveillance.

Q. Was that the last time you talked to Transeth about your testimony?

A. Yes, sir, except for refreshing my memory with my notes.

Q. When did you do that?

A. Today, sir.

Q. Did you and Transeth look at the same notes to refresh your recollections?

A. No, sir.

Q. Did you look at your notes or Transeth's notes?

A. I looked at my notes.

Q. Did you discuss your testimony with Mr. Transeth on the way over from Detroit to testify?

A. No, sir.

Q. Did you travel over from Detroit to Chicago and come here as a witness?

A. Yes, sir.

Q. And you didn't discuss your evidence during all of that time?

662 A. At that time we didn't know exactly what we were testifying to.

Q. You didn't know what you were expected to testify to when you came to Chicago?

A. We knew that we were going to testify to the surveillance, sir, and also possibly to—

Q. You say "we know"; did you exchange information about that?

A. Yes, sir.

Q. And how did you come from Detroit to Chicago when you were going to testify—by car or by train?

Mr. Downing: If your Honor please, I object to that. It is immaterial, how he came to Chicago.

By The Witness:

A. By car.

The Court: Sustained. Wait a minute.

By Mr. Callaghan:

Q. Are you living together here in Chicago?

Mr. Downing: I object to that.

The Court: Sustained.

By Mr. Callaghan:

Q. Did you discuss your testimony with Mr. Transeth since he left the witness stand?

663 A. No, sir.

Q. Did he discuss what he testified to with you when he left the witness stand?

A. No, sir.

Q. Did you speak to him when he left this court room?

A. No, sir.

Q. Who was driving this car when you first observed the Buick? Who was driving your car?

A. Mr. Transeth drove from Detroit to Ann Arbor, Michigan.

Mr. Callaghan: Wait a minute, Mr. Witness. I move that be stricken. I asked who was driving the Buick at the time you first observed it.

By Mr. Callaghan:

Q. Who was driving your car when you first observed the Buick at Route 17 and 12 outside of Ann Arbor?

A. Neither of us was in the car that we were driving.

Q. Well, who got into the car then and took over the driver's seat when you started to follow this car?

A. I did, sir.

Q. Did you change drivers anywhere between Ann Arbor and Detroit?

A. No, sir.

Mr. Callaghan: That is all.

664 The Court: Do you have any questions?

Mr. Walsh: Yes.

Cross Examination

By Mr. Walsh:

Q. Will you describe the Buick?

A. It was a 1950 Buick, two-tone in color, a dark blue top, a light gray bottom.

Q. How many doors?

A. Two.

Q. Do you know what model it was?

A. A 1950 Buick Riviera, I believe it is called.

Q. Would you know which size Buick?

A. No, sir.

Q. You saw two men in it when it approached you?

A. Yes, sir.

Q. Who was driving it?

A. Mr. Marshall.

Q. Have you had occasion to check the license number that you have told us about?

A. No, sir, I have not.

Q. To find out to whom it was registered?

A. I have not.

Q. Did you follow that car previously on that day?

665 A. No, sir, not until we saw it at the intersection of M-17 and U. S. 12.

Q. That is the first time you saw that car that day?

A. Yes, sir.

A. Yes, sir.

Q. Now, is that all of the film that is listed on Exhibit 90? Would you look at it? Is that all of the film that you seized on that day, on the day that the exhibit bears which is July 28, 1950?

A. Yes, sir; yes, sir.

Q. Now, were all of these cartons full or empty, or partially full?

A. They were partially filled, two of the cartons.

Q. Two of the cartons of this inventory?

A. Yes, sir.

Q. Which two?

A. From the filed cartons marked 6 millimeter commercial Kodachrome film. In one box there were two rolls missing, and from another box there was one roll missing.

Q. Did you look at some of the others, at any of the rolls at that time?

A. One of the boxes was open, or two of the boxes were open, I believe.

Q. Were they similar to this Government's Exhibit 66?

A. Yes, sir, commercial Kodachrome, yes, sir.

Q. Was that the first commercial Kodachrome that you had seized in that case?

A. Yes, sir.

Q. Is it the only commercial Kodachrome that you picked up in the case?

A. Yes, sir.

Q. Now, was this Government's Exhibit 66 in those cartons—

Mr. Downing: Objection, your Honor. That was not even gone into on direct testimony.

The Court: Well, if he knows he may answer.

By The Witness:

A. If I had seized this, sir, I think my initials would have appeared on it.

By Mr. Walsh:

Q. Well, is your answer yes, no, or "I don't know"?

A. Will you restate your question, please?

Q. Is your answer yes, no, "I don't know"?

A. Will you restate your question, please?

Q. Excuse me.

Was this Exhibit 66 in any of the cartons which you seized from Mr. Marshall's store on July 28, 1950?

A. No, sir.

Mr. Walsh: That is all.

The Court: Is there any redirect?

Mr. Downing: No, your Honor.

The Court: That is all. You may step down.
(Witness excused.)

Mr. Downing: The Government rests.

The Court: The Government rests.

Mr. Callaghan: Now, if your Honor please, before the Government rests, and before officially the resting is of record, the defendants request the court to permit them to inspect the minutes of the grand jury in this case, or if your Honor sees fit not to grant that request, that your Honor himself inspect the grand jury minutes in this case in a matter of considerable consequence that I don't think ought to be discussed publicly.

The Court: Do you have other motions?

Mr. Callaghan: We have other motions, too.

The Court: Well, we will excuse the jury at this time until ten o'clock tomorrow morning.

I will hear you on your motion, but do you want to be heard on this first?

Mr. Callaghan: Yes, it will just take a few brief 668 moments.

(The following proceedings were had out of the presence and hearing of the jury:)

The Court: Did you say you wanted to be heard in chambers?

Mr. Callaghan: It doesn't make any difference.

The Court: Oh, you meant out of the hearing of the jury.

Mr. Callaghan: Yes, your Honor.

The first count of the indictment, may it please your Honor, which is incorporated by reference into the second count of the indictment, describes the merchandise which it is charged these defendants had in their possession on July 20, 1950, as

"11 cartons of 116 Kodak film;

7 cartons of 8 millimeter Kodachrome roll film;

1 carton of 8 millimeter Kodachrome magazine film,
and

5 cartons of 16 millimeter Kodachrome movie film."

Incorporated in that description of the articles and things incorporated by reference in count 2 of the indictment, which charges that on July 20, 1950, these de-

669 fendants did transport and cause to be transported in interstate commerce the merchandise heretofore described.

Now, the only witness who has testified in this case, or who testified before the grand jury in this proceeding concerning the transportation of any merchandise in interstate commerce was the witness Marshall, who testified that on July 20 he transported in interstate commerce 11 cases of 8 millimeter magazine Kodachrome, the indictment saying that one case was thereby transported; that he transported in interstate commerce 10 cases of roll Kodachrome, the indictment describing that as 7 cases of rolled Kodachrome; and that he transported in interstate commerce 13 cases of 116 film, and the indictment describing that as 11 cases of 116 film.

What undoubtedly has happened here, and the reason we are challenging it now and asking your Honor for an inspection of the grand jury minutes, is that the prosecutor, in this case, has taken it upon himself to insert his own description of the things taken in interstate commerce, rather than that given by the witness before the grand jury, all of which has tended to confuse the defendants in their defense, and to make it impossible to defend

670 against the charges, there now having been produced by the testimony of the witness the charge in the indictment a fatal variance in this case, and I think your Honor, in the interest of justice, ought to require the inspection of the grand jury minutes so that we may know what the evidence was before the grand jury, and that the pleader is not here simply describing his version of what occurred before the grand jury in the indictment.

The Court: The motion is denied.

Are there other motions?

Mr. Callaghan: I have a similar motion or motions made as to counts 3 and 4 of the indictment, described as 30 cartons of Kodachrome roll film; that is incorporated in the fourth count by reference to the third count.

The witness in this instance testified here that a transport in interstate commerce, roughly said 25 cartons of film and that five of those cases were, I believe, the professional. That is approximately 25 cases. He made two answers to that. He said that five of those cases were 16 millimeter professional film, professional color film and

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then again he said that five of those cases were the 116 color film.

671 So he described those five cases differently on two occasions in his direct and cross examination, and then he said the rest—without saying how much—was the roll Cine Kodak 8 millimeter film.

Now, the indictment charges in both counts 3 and 4 that both 30 cartons of 8 millimeter Kodachrome roll film was the merchandise transported in interstate commerce. It makes a vast difference in this case how the merchandise is described, because the government has to prove, in order to sustain conviction under Counts 2 and 4 of this indictment, a value in excess of \$5,000.

Now, if the articles and things are misdescribed in an indictment, so that a defendant is thereafter taken by surprise, as something other and different than those taken in the articles described in the interstate commerce, then you cannot try these kind of cases fairly. You may have a value of \$10,000 or \$2,000 involved by inspection of the indictment. When you come to try the lawsuit, it is something entirely different that should be before the court than what is described in the indictment.

The Court: The motion is likewise denied.

Mr. Callaghan: The defendant Gordon now, at the 672 close of the evidence for the Government, moves the

Court for judgment of acquittal as to each separate count in the indictment, and he makes the motion separately as to each count in the indictment, and I would like to be heard briefly on Counts 2 and 4 of this indictment.

678 The Court: The motion as to each and all of the counts is denied.

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ON BEHALF OF DEFENDANT MAC LEOD.

By Mr. Walsh:

I would like to point this out. There is no identification or connection between MacLeod and Counts 1 and 2 in the record that I can see.

The Court: Your motion is for a judgment of acquittal, also, is it?

Mr. Walsh: Yes, your Honor.

The Court: You state your motion.

Mr. Walsh: That motion on the production of the Grand Jury minutes of the defendant MacLeod.

The Court: Joins?

Mr. Walsh: Debates—

The Court: Really is the same as to MacLeod?

Mr. Walsh: Yes.

The defendant MacLeod moves for acquittal on each count of the indictment counts 1 to 4.

The Court: In the record?

Mr. Walsh: Yes.

689 The Court: The motion is likewise denied. The defendants will be ready to proceed with their evidence tomorrow.

The defendant Gordon, since he is listed first in the indictment, will proceed with his evidence and then the 690 evidence of the defendant MacLeod.

Counsel for both sides are directed to prepare and submit in duplicate for the afternoon session tomorrow their instructions, if they care to have the Court consider them.

We will recess at this time until 10 o'clock tomorrow morning.

(Whereupon, at 4:45 p.m., an adjournment was taken until Tuesday, June 5, 1951, at 10 o'clock a.m.)

Before Judge Campbell and a Jury,
Tuesday, June 5, 1951,
10:00 o'clock, a.m.

Court met pursuant to adjournment.

Present:

Honorable Otto Kerner, Jr.,

U. S. District Attorney,

By: Robert J. Downing,

Assistant U. S. Attorney,

On behalf of Government;

Mr. George F. Callaghan,

On behalf of defendant Gordon;

Mr. Maurice J. Walsh,

On behalf of defendant MacLeod.

693 Thereupon The Defendants, To Maintain The Issues
On Their Parts, Introduced The Following Evidence,
To-Wit:

ARTHUR S. FLANK, called as a witness on behalf of the defendants herein, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Walsh:

Q. Will you state your name?

A. Arthur S. Flank.

Q. Where do you live, Mr. Flank?

A. 7011 North Greenview, Chicago.

Q. What is your business or occupation?

A. Operate a motion picture laboratory and film sales organization.

Q. Where is that organization located?

A. 103 South Wells, Chicago.

Q. Under what name is that business operated?

A. Superior Bulk Film Company.

694 Q. Is it a corporation?

A. No, it is not.

Q. That is a trade name?

A. Yes.

Q. Now, how long have you been engaged in that business?

A. Twelve years.

Q. And what function does that business perform?

A. We process 16 millimeter motion picture film and 8 millimeter motion picture film, black and white.

Q. How long have you been engaged in that?

A. Twelve years.

Q. Now, have you taken any special training or schooling in the art of processing film?

A. Yes. I have had special training.

Q. What is that special training?

A. I was in the army, photographic, signal corps, in the laboratory for 3½ years.

Q. And have you personally processed moving picture film?

A. Yes, I have.

Q. Both 8 millimeter and 16 millimeter?

A. Yes.

Q. Are you familiar with the cost of such processing?

695 A. Yes, I am.

Q. Now, what does it cost, what is the cost of processing 8 millimeter moving picture film in 25 ft. rolls?

Mr. Downing: Objection, your Honor.

The Court: The cost of processing, we are interested in the value of the film.

Mr. Downing: There is nothing in issue in this trial of the processing.

Mr. Walsh: There is an element of cost in this film.

The Court: Where is this indictment? You have the file out there?

Mr. Downing: Here it is.

The Court: You are asking the cost of processing what type of film?

Mr. Walsh: 8 millimeter moving picture film.

Mr. Downing: We have no 8 millimeter.

The Court: Mr. Vayo testified that type of film is processed as a cost of the film.

Mr. Downing: There is no 8 millimeter motion picture film in the indictment.

The Court: Magazine film.

696 Mr. Downing: That is not what he is talking about.

Mr. Walsh: Several times 8 millimeter roll film was given.

The Court: No, they testified about processing magazine film. If that is what you are asking about you can bring it out. The other is not an item here.

Mr. Walsh: There are three types used and as I understand it as processed by the Eastman Kodak Company free of charge—not free of charge.

The Court: It is part of the cost. There is one, a magazine film and the professional film.

Mr. Downing: That is right, your Honor.

Mr. Walsh: ~~Three~~

The Court: That was the testimony of the Government. The roll film and the kodak film is not processed. That is part of the cost.

Mr. Walsh: Well, the roll film is a movie picture film.

Mr. Downing: I think the roll film.

Mr. Walsh: Vayo testified that three forms were processed. The only one that is not is 116 Kodak film.

697 The Court: Is that your recollection?

Mr. Downing: My recollection is he did say 116 was the only film that was not processed. I don't recall

that he said the 25 was. So the 116 was not.

Mr. Walsh: May we have defendant's exhibit 2?

The Court: Just a moment. I have got my notes here. They will settle it. 116 millimeter kodak film is not processed as part of the cost. The other three are. That was Mr. Vayo's testimony. Then the cost of processing is an element.

Mr. Downing: No, my point is this: The question, as I understood the question, referred to film which is not even referred to in this indictment.

The Court: You are asking about 8 millimeter?

Mr. Downing: Motion picture film. There is nothing in this indictment about motion picture 8 millimeter film.

The Court: If you ask him about any that are listed there, 8 millimeter—

Mr. Downing: Roll film.

698 The Court: Kodachrome, 8 millimeter magazine,

I will permit him to answer on the same type of film. We are concerned with 4 types. The last three of them enumerated in Count 1, as I understood Mr. Vayo's testimony, is processed by the Kodak Company as part of the cost price. The first one listed in Count 1 is not. If you ask him about any of those and within those limits you may do so. Anything else we are not interested in.

699 By Mr. Walsh:

Q. Now, Mr. Flank, do you process color film?

A. No, sir, we do not.

Q. But you do process black and white film?

A. Yes.

Q. Are you familiar with the cost of processing color film in relation to the cost of developing black and white film?

A. Only that it must be more expensive.

Mr. Downing: I object, your Honor. I move it be stricken.

The Court: That may be stricken.

By Mr. Walsh:

Q. Do you know, as a matter of fact, whether it is more expensive?

Mr. Downing: I object to that.

By The Witness:

A. No, I don't.

The Court: He answered that he doesn't, so what is the difference?

Mr. Downing: Yes, pardon me.

By Mr. Walsh:

Q. Do you or your company process 8 millimeter film Kodachrome roll film?

700 A. No.

Q. Do you process 8 millimeter roll film?

A. Yes, we do.

Q. And what is the cost of processing a roll of 8 millimeter roll film?

Mr. Downing: Just a minute, your Honor.

The Court: That is not charged here. Sustained.

By Mr. Walsh:

Q. Are you a distributor of Eastman Kodak film?

A. No, we are not.

Q. Do you buy and sell it?

A. No, we buy it and use it.

Q. You buy it and use it?

A. Yes, sir.

Q. And what types of their film do you buy and use?

A. Positive film for printing, panchromatic roll film for camera use.

Q. Do you buy and use 16 millimeter Kodachrome movie film?

A. No, we do not.

Q. Known as commercial film?

A. Yes, we do.

Q. Such as the type contained in Government's Exhibit 66 (indicating)?

A. Yes.

Q. Now I direct your attention to July 19, 1950, and ask you what price—Well, from whom do you buy this film?

A. From the Brulatour Company.

Q. J. E. Brulatour Company?

A. Yes, Incorporated.

Q. In Chicago?

A. Yes.

Q. And what price did you pay in July, 1950, for the type of film contained in Government's Exhibit 66?

A. May I refer to my price list?

The Court: Certainly.

By The Witness:

A. (Continuing) \$7.95 a hundred feet.

By Mr. Walsh:

Q. Did that include processing?

A. Yes, it does.

Q. That is, you don't process that film yourself?

A. No.

Q. You send it to the Eastman Kodak Company and they process it for you?

A. Yes, sir.

Q. And that included all taxes?

702 A. According to the price list, yes.

Q. Is that the price that you paid in July of 1950, or has there been a raise since July of 1950?

A. There has been no raise since July, 1950, to my knowledge.

Q. Do you know the cost of processing this type of film?

A. No, I don't.

Q. Do you purchase 8 millimeter Kodachrome roll film?

A. Yes.

Q. And do you distribute that and sell it?

A. No.

Q. You do not?

A. No.

Q. Do you purchase it as a user?

A. Yes.

Q. What is the price you pay for it?

A. Will you repeat the type of film, please?

Q. 8 millimeter Kodachrome roll.

A. \$3.75 is the retail price.

Q. And what is the price that you pay for it?

A. Our discount is 20 percent.

Q. 20 percent?

A. Yes.

703 Q. And you are not a dealer?

A. No, I am not.

Q. Now, how about 8 millimeter Kodachrome magazine film? Do you purchase that for use?

A. Yes.

Q. And what is the price for that?

A. \$6.75.

Q. And what is your discount on that?

A. 20 percent.

Q. That is an 8 millimeter magazine?

- A. No, that is 16 millimeter magazine.
 Q. I am talking about 8 millimeter.
 A. 8 millimeter magazine, \$4.50.
 Q. \$4.50?
 A. Yes.
 Q. What is your discount on that?
 A. 20 percent.
 Q. What is your discount on 16 millimeter Kodachrome movie film?
 A. The discount is the same, 20 percent. There is no discount. The prices given us are the net prices by the distributor.

Mr. Downing: By "this," are you referring to Exhibit 66?

704 The Witness: Yes.

By Mr. Walsh:

- Q. 16 millimeter Kodachrome movie film?
 A. Yes, sir.
 Q. On that you get no discount?
 A. Those are sold net prices to commercial users only.
 Q. And how much do you pay for a roll of this?
 A. \$7.95.

Mr. Downing: By "this," he is referring to Government's Exhibit 66.

The Court: The record may so show.

By Mr. Walsh:

Q. Now, have you ever processed film and found the emulsion to be faulty?

Mr. Downing: Objection, your Honor. That is immaterial to the issues in this lawsuit.

The Court: Sustained.

By Mr. Walsh: There is testimony that the emulsion on one of these types of film was bad.

The Court: There is no testimony as to the shipment involved here. That was the shipment to New Jersey.

Objection sustained.

05 By Mr. Walsh:

Q. Well, let me ask you this, then: If film is processed, manufactured through an emulsion and it is determined after it is completed by examination of samples of film or some of them, that the emulsion was faulty, can you state whether or not the faults of that emulsion would be apparent in all of the film from that emulsion?

Mr. Downing: Objection, your Honor, to the question.

The Court: Sustained.

By Mr. Walsh:

Q. Do you have an opinion on that subject?

Mr. Downing: Objection, your Honor. The question—or the objection has been sustained.

The Court: Sustained.

By Mr. Walsh:

Q. Well, suppose, Mr. Witness—

Mr. Downing: If it please your Honor, I object to any question—I appreciate the fact there is no question pending, but I object to any question pertaining to the emulsion, and he is not an employee of Eastman Kodak, and he has nothing to do with the Eastman Kodak.

706 The Court: That was the basis of my ruling on your other question.

By Mr. Walsh: I would like to make my record.

The Court: Certainly.

By Mr. Walsh:

Q. Assume that the Eastman Kodak Company manufactured some film on special order in an emulsion numbered 5268-176, and that a limited number of rolls were prepared from that emulsion, that one part of those rolls was sent to New Jersey to the J. E. Brulatour Company, and another section of the film from that emulsion was sent to Chicago; assume that it was determined that the emulsion was faulty and the film from New Jersey was recalled entirely.

Would you have an opinion, or do you have an opinion concerning the effectiveness or usefulness in regard to the emulsion qualities of the film that was sent to Chicago?

A. Yes.

Mr. Downing: Objection, your Honor. I think this man has not been qualified on the basis to answer a question of that type.

The Court: Regardless of that, it is immaterial. Sustained.

707 By Mr. Walsh:

Q. Have you ever attempted to develop film which was produced with a faulty emulsion?

Mr. Downing: Objection, your Honor.

The Court: Sustained.

By Mr. Walsh:

Q. Now, are you familiar with the discounts given to dealers on the film about which I asked you?

A. Yes.

Mr. Downing: Objection, your Honor, because this man, first of all, is not qualified as an employee of the Eastman or Brulattour Company, and is qualified solely as a person who operates a particular company, and he is acquainted with what he receives, and that is all the qualification is based on.

The Court: No, on prices of film that he deals in, I think he is qualified here. You are going to ask him about film such as described in the indictment that he says he bought?

Mr. Walsh: I have limited the question to the film such as we have been talking about.

The Court: Objection overruled.

By Mr. Walsh:

708 Q. With regard to 8 millimeter Kodachrome film, do you know the discount allowed to Eastman distributors on that type?

Mr. Downing: Objection. That is all covered on those three types of the film.

The Court: He stated he pays \$4.50, less 20 percent.

Mr. Walsh: But he is not a dealer.

The Court: How does he qualify? I thought you wanted to establish price.

By Mr. Walsh:

Q. You have been in the business for twelve years?

A. Yes.

Q. Are you familiar with the prices in the trade and industry?

A. Yes, I am.

Mr. Downing: I still say it is repetitious.

The Court: I will let him answer.

By Mr. Walsh:

Q. What is the discount given to dealers?

A. 33 1-3 percent.

Q. And on 8 millimeter Kodachrome Magazine film, what is the discount given to dealers?

A. 33 1-3 percent.

709 Q. Do you know what the discount is on 116 Kodak film?

A. I do not.

Mr. Walsh: That is all.

Cross Examination

By Mr. Downing:

Q. You are not employed by Eastman Kodak?

A. No, I am not.

Q. Have you ever been employed by Eastman Kodak?

A. I have not.

Mr. Downing: That is all.

710 MARYLIN GORDON, called as a witness on behalf of the defendant Gordon, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Callaghan:

Q. What is your name, please?

A. Marylin Gordon.

The Court: M-a-r-i-l-i-n?

The Witness: M-a-r-y-l-i-n.

By Mr. Callaghan:

Q. You are the wife of the defendant Kenneth Gordon?

A. Yes.

Q. Were you the wife of the defendant Gordon in July of 1950?

A. Yes.

Q. How long have you been married?

A. It will be two years in June.

711 Q. Do you have a family?

A. Yes, I have a daughter nine months old.

Q. Mrs. Gordon, I call your attention to Saturday, July 22, 1950, and ask you if you know where the defendant Gordon was on that day at the hour of 4:30 p.m.

A. Yes, I do.

Q. Where was he?

A. He was with me on his boat.

Q. Do you know where he was earlier that day?

A. Yes, we both got up together about eleven o'clock that morning, and we went out on his boat for a picnic lunch, and we were there all day.

Q. Do you know where you were from four-thirty until later that evening, or into the evening?

A. Yes.

Q. Where were you?

A. We left the boat about 4:25 or 4:30 and went to my mother's house for dinner, and spent the evening there.

Q. Was there occasion on July 22, 1950, for you to go

to your mother's house for dinner?

A. Yes, we celebrated my birthday.

Q. Was your stepfather present at that dinner?

A. Yes.

712 Q. Where was that dinner had, at your mother's home?

A. At my mother's home.

Q. Do you know what time you left that night, July 22?

A. We all left about eight-thirty or nine, and went for a ride.

Mr. Callaghan: You may cross examine.

Mr. Downing: No cross examination.

The Court: That is all, you may step down.

(Witness excused.)

713 STANLEY GOLDMAN, called as a witness on behalf of the defendant Gordon, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Callaghan:

Q. What is your name, please?

A. Stanley Goldman.

The Court: What is the first name?

The Witness: Stanley.

The Court: Spell the last name, please.

The Witness: G-o-l-d-m-a-n.

The Court: Thank you.

By Mr. Callaghan:

Q. Where do you live, Mr. Goldman?

A. 426 Belmont Avenue.

Q. What is your business or profession?

A. I am in the commercial banking business.

Q. Do you know the defendant, Kenneth Gordon?

A. I do.

Q. How long have you known him?

A. About three years.

Q. Are you related to him by marriage or otherwise?

A. I am.

714 Q. What is your relationship?

A. Father-in-law.

Q. I call your attention, Mr. Goldman, to July 22, 1950, Saturday the 22d, 1950, and ask you if you know where the

defendant Gordon was on that day, at or about the hour of 4:30 p.m.

A. Yes.

Q. Where was he?

A. Well, at 4:30?

Q. Yes, sir.

A. He was on his way to our home.

Q. Did you see the defendant Gordon at or about 4:30 p.m. on July 22, 1950?

A. At that time or a few minutes later.

Q. How much later?

A. Oh, maybe ten or fifteen minutes.

Q. Where did you see him?

A. At our home.

Q. ~~What was~~ the occasion for him being at your home?

A. A dinner party for our daughter, his wife, a birthday.

Q. What was the occasion of the dinner party?

A. A birthday dinner.

715

Cross Examination

By Mr. Downing:

Q. When did you first see the defendant Gordon on that day?

A. About the time I mentioned, between four-thirty and five. I don't know exactly, because the dinner was supposed to be exactly at five. We usually have dinner at five o'clock on the week ends.

Q. And that was sometime between four-thirty and five p.m. on July 22d?

A. Yes.

Q. That was the first time you saw him that day?

A. Yes.

Mr. Downing: That is all.

Mr. Callaghan: That is all, Mr. Goldman.

The Court: Step down

(Witness excused.)

Mr. Callaghan: I have another witness, and I expect that he is not here.

Mr. Gordon.

716 KENNETH C. GORDON, one of the defendants herein, called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Callaghan:

Q. What is your name, please?

A. Kenneth Gordon.

Q. How old are you, Mr. Gordon?

A. Twenty-nine years old.

Q. Where do you live?

A. 515 Roscoe.

Q. Are you married?

A. Yes, sir.

Q. Do you have a family?

A. Yes, sir, I have a daughter.

Q. Of what does that family consist?

A. One daughter, nine months old.

Q. You are a defendant in this proceeding, Mr. Gordon, are you?

A. Yes, sir.

Q. Do you know a man named James Marshall?

A. I have seen him now, in the court room.

Q. Do you know a man named Albert Swartz?

A. Yes, sir.

717 Q. Did you hear Mr. Marshall testify in this proceeding?

A. Yes, sir, I did.

Q. By the way, what is your present occupation?

A. Well, I am on orders to go into the Army, so I had to sell my jewelry store.

Q. When did you sell the jewelry store?

A. I think we completed the deal around February, the end of February of this year.

Q. Where was that jewelry store located?

A. 21 East Adams Street.

Q. Did you conduct a pawnshop there?

A. Never.

Q. Was that a loan business?

A. No, sir, it was a jewelry store.

Q. What was the name of the jewelry store?

A. Liberal Jewelers.

Q. And that was its name since you took over the business in what year?

A. I took over the business in 1946, and it has been "Liberal Jewelers" ever since.

Q. Mr. Gordon, when did you first see the witness, James Marshall?

A. The first time I saw Mr. Marshall was when 718 he accompanied Mr. Swartz into my store, last year.

Q. Do you remember the day that you first saw him, or the date?

A. Not exactly; sometime in July.

Q. Can you fix it any more definitely than just sometime in July?

A. It was about the middle of the month. I couldn't state any closer.

Q. Well, will you tell the court and jury now what occurred on the occasion of your first seeing Mr. Marshall sometime in July of 1950?

A. Mr. Swartz and Mr. Marshall came into my store, and I was in the back room sorting diamonds, and my salesman announced that Mr. Swartz was here to see me, and I told them both to come back there. I didn't want to leave the tray of diamonds loose.

Mr. Swartz introduced me to this man as Jim, "Jim, meet Ken."

Upon sitting down, he pulled out a ladies' compact.

Q. Who is "he"?

A. Swartz. And he asked me if I would be interested in buying 150 of this type of compact, and it was a cheap compact, and I had no use for it in my store, and I 719 told him no.

He asked me if I had anything for him to buy so that he could make any money on it, as he came into my store and quite often bought jewelry from me.

Q. By the way, how long had you known Swartz?

A. I had known Swartz since I opened the store, about five years.

Q. Had you seen him rather frequently during the five years?

A. He made trips to Chicago, three or four or five times a year and always visited me.

Q. Did you see him on the—

A. I would say five times a year.

Q. Did you and he do business together up to the time of this occurrence?

A. Yes, sir, we bought and sold diamonds and jewelry to each other.

Q. Now, you were telling us at the time that I interrupted you, at that time he offered you some compact for sale.

Tell us what else was said on the occasion of this meeting.

A. I told Mr. Swartz I had no use for the compacts.

He asked me if I had anything he could use, and I told him I was busy right now picking out diamonds for a wedding ring, and if he would come back later I would look around, at which time Mr. Swartz said, would I be interested in buying any film, and I told Mr. Swartz we did not handle film in the store, but if he had 16 millimeter magazine film I would buy some for myself.

Q. By the way, are you an amateur photographer?

A. Yes, I am.

Q. Is it a hobby?

A. A hobby.

Q. Tell who said what.

A. I asked Mr. Swartz if he had 16 millimeter magazine, and Mr. Swartz said he didn't have magazine, but had commercial film. I didn't know what commercial film was, so I was not interested.

He departed and said they would see me later, and meanwhile I was to look around and see if I had anything for him to buy.

Q. All right. Did you see him again later that day, or subsequently that day?

A. He came back later that afternoon. He and Marshall came into the store and asked me if I had anything, and I said I had not, that I had looked around, and there was nothing of interest to Mr. Swartz except one big diamond wrist watch.

Mr. Swartz asked me about the diamond wrist watch, and told me it was sort of high priced for him, that he was tied up in a film deal, and would have the film sold by next week, and maybe he would be interested by then, if I wished to hold the watch until then.

Then he asked me, "Incidentally, do you know of a garage where I can put the film? I have a truckload of film."

I told him to look into the newspaper. He looked into the Tribune and could find no garage.

Q. Was Marshall in the store?

A. Marshall was in the back of the store with Swartz.

Q. By the way, did you at any time that you talked to Swartz in any part of this occasion, leave Marshall sitting out in the outer office?

A. No, sir, Mr. Marshall was with us.

Q. From the time he came into the store?

A. From the time he came into the store.

Q. All right, sir. Go ahead.

A. When Swartz looked through the newspaper—I tried to help him find where the garages might be listed—and there were none listed, and he said he had to move it because he was pretty sure one of the persons he had seen while he left me would take the film in about a week.

I then recalled that I had a garage behind my rooming house at 215 East Erie, and I mentioned that to him, and I asked him, "What size truck?"

And he described it as an old newspaper truck.

I thereupon called Mr. MacLeod at 215 East Erie and asked him the condition of the garage in the rear, and described the truck, and Mr. MacLeod told me he thought it would fit.

I told him, I told Mr. Swartz that we did have a space, and I told MacLeod that I was sending two people to put a truck into the garage.

Mr. MacLeod told me it would have to be made some other time because he had to go away.

I told Mr. MacLeod that he didn't have to be there, to leave the garage open, and I would send the fellows over, which I did. I wrote it down on a piece of paper, the address, 215 East Erie, and they took the truck over there, evidently.

Q. To whom did you give the piece of paper on which you wrote "215 East Erie Street"?

A. This piece of paper I gave to Mr. Swartz.

Q. Now, did they then leave the store?

722 A. They then left the store, yes, sir.

Q. Did you see Mr. Swartz—

By the way, did you exact any cost or charge for the use of that garage?

A. Mr. Swartz said he was going to give us \$20 for the use of the garage.

Q. Did he give you the twenty dollars?

A. No, he never did.

Q. Did you see Mr. Swartz at any time subsequent to that?

A. It was several days later, Mr. Swartz came back into the store with Marshall.

723 Q. Do you know the date he came back into the store?

A. No. I would say it was 5 or 6 days, maybe a week later. He came back into the store. He told me on this oc-

casion he wanted to take the truck and told me that he didn't get the key the first time he put the truck into the garage the week before.

So I said, "Well, you will have to get it from Mr. MacLeod because he put it up. It was in the rooming house, all the time. He neglected to take it up."

I had before that met Mr. MacLeod since, so I wrote back a note "See Ken over at 215 East Erie." First I merely told him to see Ken. He asked me to write it down "See Ken 215 East Erie." I gave Mr. Swartz the note. He and Mr. Marshall went over to the rooming house.

Q. Did you go with them?

A. No, I did not. I stayed in the store.

Q. Were you at 215 East Erie with him on any occasion?

A. I was never at 215 East Erie with him on any occasion, or in the garage with him.

Q. Were you ever on July 20th at any garage on the north side of Chicago with Mr. Swartz and Mr. Marshall?

A. I have never been to any garage with Mr. Swartz and Mr. Marshall.

724 Q. On any occasion?

A. On any occasion.

Q. Were you on any occasion with Mr. Swartz and Mr. Marshall at any parking place other than a garage, or any parking lot or parking space behind any buildings on the north side of Chicago?

A. No, sir, I never was.

Q. You have no exact definite recollection of the day?

A. No, sir.

Q. That was involved in these two trips?

A. No, I have not.

Q. I call your attention particularly to Saturday July 22, 1950, and ask you if you know where you were on that particular day?

A. Yes, sir, I do.

Q. Do you have some reason for remembering that particular day?

A. Yes, sir, I spent it with my wife on her birthday, celebrating her birthday.

Q. Do you know where you spent the morning of that day?

A. The morning, it was from about 10:30 to 11 o'clock I spent it on my boat at Dyersey Harbor.

725 Q. How long did you stay at Diversey Harbor on that day?

A. We stayed at Diversey Harbor from 11:30 to approximately 4:30.

Q. You left there at about 4:30 that day?

A. Yes, sir, on that occasion.

Q. Who was in your company when you left there at 4:30, by the way?

A. My wife.

Q. Where did you go then?

A. We went over to her mother's for her birthday dinner.

Q. How long did you remain there?

A. I remained there until oh, approximately 8 or 8:30 that evening.

Q. Was Mr. Goldman present at that dinner?

A. Yes, he was.

Q. Did you ever meet Swartz and Marshall at Division and Michigan Avenue, in the City of Chicago—

Mr. Callaghan: Strike all of that. Strike the whole question and I will withdraw it.

By Mr. Callaghan:

Q. Did you, on July 22nd, 1950, at or about the hour of 4:30 p.m. meet Swartz and Marshall at Division and 726 Michigan Avenue, in the City of Chicago?

A. No, sir.

Q. Have you ever been convicted of a felony?

A. No, sir.

Q. What was your status in the army?

A. I was an officer on reserve.

Q. Now, Mr. Gordon, you have heard the witnesses Mehegan and McCormick testify here about some conversation that they say they had with you, if my memory serves me correctly, in November, 1950.

Did you have a conversation with Mehegan and McCormick?

A. Yes, I did.

Q. Do you remember the occasion of the first conversation?

A. The first occasion, Mr. Mehegan was not present. It was just Mr. McCormick in the Bankers Building.

Q. Was the conversation that you had at that time with Mr. McCormick reduced to writing?

A. No, sir.

Q. Did you hear Mr. McCormick testify about what that conversation was?

A. Yes, sir.

Q. Did that conversation occur as Mr. McCormick related it?

727 A. No. He changed it quite a bit.

Q. Will you tell us now what occurred at that conversation, what you said to Mr. McCormick and what he said to you?

A. Mr. McCormick in the offices of the FBI asked me if I knew about any stolen film.

Q. By the way, how did you happen to go to the FBI on that day?

A. I was on my way down to the store. They arrested me.

Q. Who is "they?"

A. Mr. McCormick and another agent.

Q. Took you into custody?

A. Yes, sir.

Q. All right, sir, go ahead.

A. They asked me if I knew anything about stolen film and I denied it.

They accused me of having stolen film in the garage, which I denied. As a matter of fact, they tried to bully me into saying I actually stole the film and, of course, I denied everything.

They made a proposition. They said, "If you can find out who stole it, we are not after you."

I denied everything.

728 He asked me about Mr. Marshall who I did not know at that time. I only had known him as Jim.

They showed me a picture which generally resembled him. I can see now it is him now.

Q. Did they show you any pictures of Swartz?

A. No, they did not. They asked me about Mr. Swartz.

Q. They asked you if you knew Mr. Swartz?

A. Yes.

Q. Did you tell them you did?

A. I told them I did.

Q. Did you on that occasion or on any other occasion say to Mr. McCormick after having made these denials, "Mr. McCormick, if I were to name everybody in Chicago to whom I had sold stolen merchandise I would have to name a lot of people?"

A. That is a lie.

Q. When did you talk to Mr. Mehegan and Mr. McCormick together?

A. It was a few weeks later. They called me on the telephone and asked me to come over to the FBI office after I had closed my store, which I agreed to do.

Late in the afternoon before I closed the store they barged into the store and called me into the back room.

Q. By the way, how big is that back room?

A. The back room of my store is about 7' wide at 729 the most and about 10' long.

Q. Will you tell us about this conversation you had with Mr. Mehegan and Mr. McCormick at your store?

A. They produced a red piece of paper with the name "Ken 215 East Erie."

Q. I now show you a document which has been marked here as Government's exhibit which is received in evidence.

Mr. Downing: It is in evidence.

By Mr. Callaghan:

Q. Which is in evidence as Government's exhibit 83, and ask you if you have ever seen that document before?

A. Yes, sir, I have.

Q. On that occasion that you are now testifying to?

A. Yes, sir.

Q. All right, sir, what was said and by whom?

A. Mr. McCormick or Mr. Mehegan, I don't recall. They alternated questioning me. Asked me if I knew what this piece of paper was.

I said, "Well, that is the address of our rooming house and that is my name on there."

He said, "Do you remember writing that yourself?"

I said, "No, I do not."

730 Q. Was there some question about your handwriting at that time?

A. Yes, sir. They asked me, "Is this your handwriting?"

I said, "Well, it could be." I said, "I am not positive."

He said, "Sign the piece of paper and we will check it."

And I said, "I do not sign any blank piece of paper. If you want my signature, it is on file at the bank."

Q. Did you tell him the bank where you did bank?

A. Yes. I told him the bank.

Q. Did you bank at that bank?

A. Yes, sir, I did.

Q. By the way, were you placed under arrest and re-

quired to give bail on the occasion when they took you into custody, at the first occasion when they questioned you?

A. No, sir, they released me.

Q. After questioning you they released you?

A. Yes, sir.

Mr. Callaghan: Will your Honor bear with me for just one moment?

731 By Mr. Callaghan:

Q. Now, did you ever sell to Albert Swartz or James Marshall any film?

A. No, sir, I never did.

Q. Did you ever receive any money in connection with any film from Mr. Swartz or Mr. Marshall?

A. No, sir.

Q. Did you ever give them any money in connection with any film?

A. No, sir.

Q. Did you ever on any occasion own, or possess any stolen film?

A. No, sir.

Q. Or have anything to do with any stolen film?

A. No, sir, I did not.

Mr. Callaghan: You may cross examine.

Cross Examination

By Mr. Downing:

Q. Mr. Gordon, you have an interest in this property at 215 East Erie Street, is that right?

A. No, sir.

Mr. Callaghan: Objected to as not proper cross examination.

The Court: In view of his sending these people
732 up there to the garage, I think it is proper.

Mr. Callaghan: I will withdraw my objection.

The Court: Proceed.

By Mr. Downing:

Q. You say you have no interest in that?

A. No, sir.

Q. Did you tell Mr. McCormick and Mr. Mehegan that you had an interest in the establishment?

A. I did at that time, sir.

Q. Now you say you have no interest in it?

A. No, sir.

Q. When you talked to Mr. Marshall or Mr. Swartz, you say that you had this conversation with them in the rear of your store?

A. Yes.

Q. Is that what is known as the office?

A. Yes.

Q. Who else was present at the time?

A. In the rear there was just Mr. Marshall, Mr. Swartz, and myself.

Q. Did you have any employee at the store at that time?

A. Yes, sir.

733 Q. And who was the employee?

A. One employee was Mr. Welcher, and my partner was out in front, Mr. Spitz.

Q. One of those two gentlemen was a white-haired man?

A. Yes.

Q. Which one is the white-haired man?

A. Mr. Welcher.

Q. During the time that Mr. Marshall and Mr. Swartz were talking to you, you say Mr. Marshall and Mr. Swartz were both in the back room.

A. Yes, they came into the back room after I called them back, both of them.

Q. At no time Mr. Marshall was out in front alone?

A. No, sir.

Q. With respect to the length of time that they were back there talking to you, how long was Mr. Marshall and Mr. Swartz back in the back room talking to you on that day?

A. I would say around, in the morning when they came in, it was around noon when they first came in. They were there about 15 or 20 minutes in the store.

Q. The entire time was spent in the back room, was it?

A. Yes.

Q. Was there a second time in which they both
734 came into your store?

A. Later that afternoon.

Q. And did they go into the back room and talk to you at that time?

A. Yes, sir.

Q. And they both came back into the back, just like they did on the first occasion, did they?

A. Yes.

Q. Approximately how long were they in the back room? At that time?

A. Oh, approximately 20 minutes, a little longer than the morning.

Q. A little longer this time?

A. Yes.

Q. On that occasion Marshall did not spend any time out in front there, just like the first occasion?

A. I do not believe he did.

Q. He was back there in the back room with you and Swartz all the time?

A. He might have walked out while Swartz and I were discussing a wrist watch.

Q. It was not for any great length of time, is your recollection?

A. No, sir.

Q. You had an opportunity to see Mr. Marshall 735 during both of those visits?

A. Yes.

Q. You were rather close there in the back room with him and Mr. Swartz, is that right?

A. Yes.

Q. After that day did you see Mr. Marshall in Chicago again?

A. He came in several days later, yes, sir.

Q. Who was he with on this occasion?

A. Mr. Swartz.

Q. How long were they in the store on this occasion?

A. On this occasion they were probably in four or five minutes at the longest.

Q. Did they go into the back room together with you on this occasion?

A. No. Mr. Swartz just came into the back.

Q. What did you and Mr. Swartz have a conversation at this time about?

A. He wanted to pick up the film. Wanted to know how he could get the key for the garage, where it was at.

Q. How did you know where to get the key?

A. Mr. MacLeod had told me. In the meantime, that the key was still in the rooming house where he had 736 left it when he opened the garage and he wondered why they did not pick it up on the first occasion when they put the truck in.

Q. Did you have any interest in this property at that time?

A. Yes, I did.

Q. At that time you had some interest in the property?

A. Yes.

Q. At that time you had some interest in the property?

A. Yes.

Q. What was your interest in the property at 215 to 217 East Erie?

A. I was a partner with Mr. MacLeod.

Q. At that time what was your relationship? Did you split the profits with him?

A. Yes, sir.

Q. On what percentage?

A. 50-50.

Q. Are you still a partner with him?

A. No. I sold it to him pending my going into the army.

Q. When did you make that sale?

A. That was about 6 or 7 weeks ago.

Q. Did you use any partnership agreement or any bill-of-sale or anything of that nature?

A. Yes. He had a legal form which I signed, turning it over to him.

Q. How much did you pay him?

Mr. Callaghan: I object to all of these details as not being material.

The Court: Ask him what he paid, is sustained.

By Mr. Downing:

Q. Marshall and Swartz were with you in the store 3 or 4 minutes the second time, is that right?

A. Yes, sir.

Q. Did you give them a note as to where to go?

A. Yes.

Q. Is that the note that is listed here as Government's exhibit 83?

A. Yes, sir.

Q. Was that written by you?

A. Yes, sir.

Q. This is written on paper which you had there in the store on that day, is that right?

A. Yes.

Q. That is the same type of paper as illustrating Government's exhibit 91, is that right, sir?

A. Yes, sir.

Q. Now, at the time when Mr. Mehegan and Mr. McCormick came over to your store on November 29th when they showed you Government's exhibit 83, you told them you did not use any of that paper since 1946?

A. I told them I did not use it as bills.

Q. You told them you did not use it as bills?

A. Scratch pads, I told them we used it, as scratch pads.

Q. Then, what did you tell them?

A. They asked me if we used it as a bill.

I said no, we did not. It is not the Liberal Loan Bank any more.

Q. First they asked you whether you used it as a bill, is that right, sir?

A. Yes.

Q. Thereafter, do you recall them showing you exhibit, Government's exhibit No. 91?

A. No, sir, they never showed me that.

Q. They did not show this to you on that date, did they?

A. No.

Q. This is Government's exhibit 91?

A. That is right.

Q. And did you see them pick this up on the floor?

A. I saw them bend down and pick something up.
739 I didn't know what they picked up.

Q. Neither Mr. Mehegan or Mr. McCormick showed you Government's Exhibit 91 on November 9th?

A. They bent down and shoved it into their pocket very quickly. I don't know whether they picked something off the floor, or not.

Q. Did you say anything to them?

A. No. They are supposed to be honorable gentlemen.

Q. Do you have any reason to believe there was anything of value on the floor they took?

A. No.

Mr. Walsh: Are you trying to create the impression he thought they took something.

I object.

The Court: Sustained.

By Mr. Downing:

Q. How many photographs did they show you of Mr. Marshall at the time they talked to you on November 8th?

A. One, one photograph.

Q. Would you recognize that photograph if you saw it?

A. Possibly.

Mr. Callaghan: I submit, if your Honor please, on the Government's case we tried very hard to get these photographs. They did not have them. That is not proper cross examination.
740

The Court: Objection overruled.

Mr. Walsh: These pictures are not identified as the ones being shown.

The Court: Are you making an objection?

Mr. Walsh: I want to add to Mr. Callaghan's statement.

The Court: Objection overruled.

Mr. Downing: Mark these as Government's exhibits 95, 96, 97, and 98.

Mr. Callaghan: May I examine what he is about to show to the witness?

Mr. Downing: Certainly. I will be glad to show you.

The Court: Certainly.

(The said photographs were marked as requested).

Mr. Downing: Let the record show I am handing Mr. Callaghan Government's exhibits 95 through 98.

Mr. Walsh, have you looked at these?

Mr. Walsh: No. I will look at them when you take them to use on my client.

741 By Mr. Downing:

Q. I will show you Government's exhibits 95, 96, 97 and 98. Commencing with 95, I ask you if you have ever seen that photograph before?

A. No, sir.

Mr. Callaghan: In fairness to the witness, your Honor please, he should show him all these photographs and ask him which one he is showing him. He is showing him only one photograph.

The Court: I think he is proceeding properly.

By Mr. Downing:

Q. I will show you Government's exhibit 96 and ask you if you have seen that photograph before?

A. No, sir.

Q. I will show you Government's exhibit 97 and ask you if you have seen that photograph before?

A. I believe that might have been the one in the larger version.

Q. In a larger version?

A. They showed me a large picture.

Q. I will show you Government's exhibit 98 and ask you if you have seen that one before?

742 A. No, sir.

Q. So of the four I have shown you, Government's exhibit 97, will you say that exhibit on a smaller scale was shown to you on November 8th?

A. I would not say positively, no, sir.

Q. Have you any definite recollection as to either of the other three?

Mr. Callaghan: I submit he has answered the questions about this.

The Court: Sustained.

By Mr. Downing:

Q. Will you say this was not shown to you on November 8th?

Mr. Callaghan: I object to this.

By Mr. Downing:

Q. Government's exhibit 97?

A. No, I would not say it was not shown to me.

Q. And at the time you were shown the photograph of James Marshall on November 8th, you had seen him in your store as you previously testified, is that right?

A. Yes, sir.

Q. And that was on the two occasions on the one day, and on the one occasion on the second time, is that right, sir?

743 A. Yes, sir.

Q. Now, did you see this truck load, did you see the truck load of film that they brought?

A. No, sir, I never had any occasion to see that truck load of film.

Q. Did they describe the truck to you?

A. When I tried to find out the size for our garage, they described it, yes.

Q. Who described it?

A. Mr. Marshall described it.

Q. What did he say the description of the truck was?

A. He said it is like an old newspaper truck, newspaper delivery truck.

Q. Did he say whether it was a panel or stake body truck or did he tell you at that time?

A. I understood what he meant.

Q. What did you understand?

A. Old delivery trucks.

Q. That is an old panel type truck?

A. An old panel type truck, yes, sir.

Q. Did he tell you the type of truck, that is, whether it was a Ford or Chevrolet?

A. No, sir.

Q. Did he tell you what year the truck was made?

744 A. No.

Q. Did you go up to 215 to 217 into the garage at any time while this truck was there?

A. No, sir.

Q. Did you talk to Mr. MacLeod about the truck at any time?

A. I called him and asked him if it would fit in there the first time. He said he thought so.

Q. What description of the truck did you tell him?

A. I told him an old newspaper type delivery truck. He said he thought it would fit in.

Q. You stated that you took over this business in 1946? Did you buy the business on that date?

Mr. Callaghan: Which business are you talking about?

Mr. Downing: Whichever business he took over.

Mr. Callaghan: There is two businesses, one on Erie Street and there is a jewelry store.

The Court: Yes, state.

By Mr. Downing:

Q. With respect to the jewelry store business at 21 E. Adams St., your testimony was you took that over 745 in 1946?

A. Yes.

Q. Did you buy the business on that day?

A. Yes, sir.

Q. From whom did you buy it?

A. The Government.

Q. From the government?

A. Yes.

Q. From what office of the government did you buy it from on that day?

Mr. Callaghan: I submit it is immaterial, if your Honor please.

The Court: Sustained.

By Mr. Downing:

Q. Did you operate the business from 1946 until February of 1951?

A. Yes, sir.

Q. Was it a corporation?

A. A partnership.

Q. What was the partner's name?

A. Allan Spitz.

Q. For the entire period of time from 1946, what part of 1946 did you acquire ownership?

746 Mr. Callaghan: I submit there are two questions.
By Mr. Downing:

Q. What part of the year 1946 did you acquire ownership?

A. It was around July.

Q. July of 1946?

A. Yes.

Q. From July of 1946 to February of 1951, was this Mr. Spitz your partner?

A. Yes.

Q. Is he any relative of yours?

A. He is.

Mr. Callaghan: I submit it is immaterial.

The Court: I think it is, too. At least it is not proper cross examination.

Mr. Downing: If the Court please, we have no idea of anticipating what else is going to come on here. We can't call the defendant Gordon as a witness.

The Court: You did not go into it on direct.

Mr. Downing: This is the defendant.

The Court: He is entitled to get what personal history he wants, but on the other hand, this is something he
747 does not get and it is not material. I don't think it becomes proper because he happens to be the defendant.

Objection sustained.

Mr. Downing: May I just make this statement, your Honor? After all, the man stated he took over this business in 1946. He further stated he was in business until February, 1951. Now, I think, as I say, we cannot anticipate what else might be put on in the way of business. Naturally, the Government can't call the defendant as a witness.

Mr. Callaghan: He is on the stand as a witness. You don't have to call him.

The Court: Wait.

Mr. Callaghan: I am sorry.

Mr. Downing: I am trying to determine certain facts which may or may not be later elicited in the process of the defense of this case. I think this is desirable for us. At least, that question is certainly not immaterial, or certainly not prejudicial.

The Court: I have already ruled it immaterial.

Mr. Walsh: I object to the remarks of counsel.

747a The Court: There is nothing before the Court.

Mr. Walsh: There is this, your Honor. I would like to make this motion.

The Court: Everyone is making statements. There is nothing before the Court. I have already ruled on the question and sustained the objection of Mr. Callaghan. We will have a time for argument when the case is over.

Mr. Walsh: May I make a motion for a mistrial, your Honor, on the remark of counsel's statement that he cannot call the defendant as a witness.

The Court: The motion is denied.

Mr. Walsh: It is an objection on behalf of Mr. MacLeod.

By Mr. Downing:

Q. How long have you known Albert Swartz?

A. Approximately 4 or 5 years, since I opened the store.

Q. You have done business with him off and on up until how long?

A. Oh, until, the last time he was in there and tried to sell me film.

Q. That was the last time that you did business with
748 Albert Swartz?

A. Yes, sir.

749 Q. Now, as a matter of fact, Mr. Swartz was in Chicago and had talked to you about some matters in the early part of July before he came in about the film; do you recall that?

A. No, sir.

Q. Do you recall seeing Mr. Swartz—

Mr. Callaghan: Wait a minute. I object to that statement, Counsel, and I submit it is not a proper question.

The Court: Well, the question was answered. It may stand.

Proceed with another question.

By Mr. Downing:

Q. Do you recall seeing Mr. Swartz in Chicago about sometime immediately before or after July 4th of 1950?

A. Well, he was in Chicago approximately six, seven weeks before he was in on the occasion I described.

Q. On this transaction that you testified to?

A. That's right.

Q. Now, at that time was Marshall with him?

A. No, sir.

Q. To refresh your recollection, do you recall whether at that time he was on a vacation in Chicago?

A. I don't believe he was.

750 Q. At least you don't recall that, is that right?

A. No.

Q. Now, after he was here in Chicago on that time, and before he returned with Marshall, as you testified, did you have occasion to make a telephone call to him in Detroit?

Mr. Callaghan: I object to this, Your Honor, as not being proper cross examination. It is a matter that is not material to this inquiry, something that happened six or seven weeks prior to the incidents in this trial.

The Court: The objection is overruled.

The Witness: Which period?

By Mr. Downing:

Q. Immediately before the first time he came here with Marshall, and subsequent to the time you said you saw him before when he was here with Marshall?

A. I never made any telephone call to Mr. Swartz.

Q. During the second week in July, about July 12th, did you have occasion to call Mr. Swartz and talk to him about some film?

A. No, sir.

Q. As a matter of fact, on July 20th, when the first time Mr. Swartz came to Chicago—

751 Mr. Callaghan: Wait a minute, please. I object to that because it assumes something about which this witness has not testified.

The Court: Let him finish the question. I cannot rule on it until I hear the question.

Mr. Downing: Strike that phase of the question.

By Mr. Downing:

Q. Now, you had a conversation with Swartz on the day he first came here with Marshall, is that right?

A. Yes, sir.

Q. And at that time did you tell Swartz that you did not care to deal with too many people, that you would like to deal with him exclusively on this film?

A. No, sir.

Q. Did you ever have such a conversation?

Mr. Callaghan: I submit that is not a fair question unless counsel is prepared to prove it on rebuttal.

The Court: As you making an objection?

Mr. Callaghan: Yes, sir, I object to it on that basis.

The Court: Objection overruled.

By Mr. Downing:

752 Q. Did you ever have such a conversation with Mr. Swartz?

A. No.

Q. I believe you testified that Mr. Swartz never paid you any sum of money in connection with any film?

A. No, sir.

Q. And you are referring to at any time, is that right?

A. Yes, sir.

Q. As a matter of fact, in 1950, in July, didn't Mr. Swartz pay you \$125 per case for 8 millimeter film?

A. I never sold him any film, no, sir.

Q. And did you sell him any 116 film for \$30 to \$40 a case?

A. I never sold him any film.

Q. Did you sell him any 16 millimeter film for \$75 a case?

A. No, sir.

Q. When was the last time that you saw Mr. Swartz?

A. The last time I saw Mr. Swartz was on the second occasion when he came in.

Q. Do you know Mr. Swartz is deceased at the present time?

A. Yes, sir.

753 Mr. Downing: That is all.

Mr. Callaghan: That is all.

The Court: Is there any redirect?

Mr. Callaghan: That is all.

The Court: You may step down.

(Witness excused.)

754 KENNETH J. MAC LEOD, one of the defendants herein, called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Walsh:

Q. Will you state your name, please?

A. Kenneth J. MacLeod.

Q. Where do you live, Mr. MacLeod?

A. 1150 North Lake Shore Drive.

Q. How long have you lived there?

A. Not quite three years.

Q. You are one of the defendants in this case?

A. I am.

Q. How many persons reside in that building?

A. Something between 50 and 70, I would imagine.

Q. Are you a tenant?

A. I am.

Q. Do you have any other dominion or control over those premises?

A. No, sir.

Q. Now, what is your business or occupation now?

A. I operate a residential girls' club.

Q. That is a hotel or rooming house?

A. It could be classified as either, but mostly as a 755 rooming house.

Q. Where is that located?

A. 215 East Erie Street.

Q. How long have you been engaged in that business?

A. It will be two years the 21st of June.

Q. You were present in the courtroom when Mr. Trainer testified, were you not?

A. I was.

Q. And did you obtain your lease of those premises from him?

A. Yes, sir.

Q. And at the time you obtained that lease, was there another person who owned the business?

A. Yes, there was.

Q. That was being operated then. Who was that person?

Mr. Downing: Objection, Your Honor. It is immaterial.

The Court: Again, it is a matter of personal history of the defendant. If he wants to go into that much of it, we will permit him to do so. On that much that I permit him to go into, you can cross examine.

By Mr. Walsh:

Q. Who was that person?

756 A. Miss Catherine T. Ryan.

Q. Did you purchase her business that she operated in the premises which you had leased?

A. Yes, I did.

Q. And did you have a financial associate in that transaction?

A. I had borrowed the money then from Mr. Gordon at that time, and shortly after the transaction was closed, we agreed to go into partnership with that money.

Q. And did you devote your efforts and time to the business?

A. I did.

Q. And did he devote any time or effort to the business, ordinarily?

A. No, sir.

Q. He had a financial interest, and you had a working interest?

A. That is correct.

Q. Now, is he still your partner in the business?

A. No, sir.

Q. And when did that relationship end?

A. April 2, 1951.

Q. And how did it end?

A. I purchased his interest.

757 Q. And you are now the sole owner of the business?

A. That is correct.

Q. And you are operating on the same lease that Mr. Trainer described?

A. Yes, sir.

Q. Now, you were his partner during July of 1950, were you not?

A. I was.

Q. And directing your attention to that month, tell us what those premises consisted of, how many rooms there are?

A. There are approximately 74 rooms occupied by nurses, stenographers, school teachers and professional women and students.

Q. Now, are there any garages at the rear of the premises that you leased?

A. Yes, sir, there is a garage.

Q. I will show you Government Exhibit 87 for identification, and ask you if that truly and correctly portrays the garage at the rear of the premises that you leased, or one view of it?

A. Yes, sir.

Q. That is Government Exhibit 87. Now, how much room is there in that garage, or what are the dimensions, roughly, or to the best of your judgment?

A. About 25 feet wide, and possibly 20 feet deep in the garage proper. That is where the automobile space of the garage is.

Q. Now, during the month of July, was that garage occupied—well, is there anything upstairs of the garage space?

A. Yes, sir.

Q. And what is upstairs?

A. An apartment.

Q. And was that occupied during July of 1950?

A. Yes, sir.

Q. Now, was the garage during July of 1950?

A. Yes, sir.

Q. And will you tell us what you know about that?

A. I don't recall what particular date it was, but late in the afternoon one day in July I received a call from Mr. Gordon. He asked—

Q. A telephone call?

A. It was a telephone call, yes.

Q. You recognized his voice?

A. Yes, sir.

Q. You are familiar with it?

A. Yes, sir, I am familiar with it.

759 Q. Yes?

A. He asked me if there was enough space in the garage to park a truck, and I told him yes, if it was a small enough truck, that it wouldn't take a large truck, and he said, would a newspaper delivery truck fit in there, and I told him it would.

He said that someone would be out to put their truck in there after awhile, and I told him that I couldn't hang around, that I had other business to take care of, and he instructed me to leave the lock unlocked, and hanging in the hasp, and that the people would come in and put the truck in themselves. I did that.

Q. Now, what was the garage usually used for prior to that time by you?

A. Storage.

Q. Storage of what?

A. Furniture, lumber, paint, supplies, just about anything—anything that was used.

Q. Material that was used in the operation of the rooming house or the other quarters?

A. That is right.

Q. Maintenance materials, principally?

A. Well, there was some furniture that the tenants had that was in there.

760 Q. Now, did you have frequent occasion to in and out of that garage prior to this time?

A. I went in and out of it quite often. I wouldn't say it was frequent, but occasionally.

Q. Did you take supplies in and out?

A. Yes.

Q. And when you entered that garage, which door did you use during the month of July, usually?

A. Usually I used both of those doors, both the big door and the small door. Usually I would say I used the large door, because getting things out would be easier in that door.

Mr. Downing: May the record show which exhibit he is referring to?

Mr. Walsh: Exhibit 87.

By Mr. Walsh:

Q. Now, did you see that truck while that was in that garage?

A. Yes, sir.

Q. What kind of a truck was that? Describe it.

A. It was an old truck. I think it was a wooden frame side—I am not sure whether it was a wood or metal—sort of a panel. I don't know what make it was, a Ford or

Chevy or something like that, some light make, quite
761 old.

Q. And what color was it?

A. I don't know.

Q. Did it have any name on the side?

A. Yes, it had a name on the door.

Q. What was that name?

A. The last name was White.

Q. Was there any address under the name?

A. Yes.

Q. Do you recall that?

A. No, I don't.

Q. Did it have license plates?

A. I didn't look. I don't know.

Q. Well, now, you weren't present when the car was put into the garage in the first place, is that right?

A. No, sir.

Q. Did you have occasion to visit the garage in company of other persons during July, 1950, while the truck was there?

A. Yes, sir.

Q. And when did that occur, if you know—the date?

A. I don't know the date.

Q. Well, was it in the early part? Well, it was after the truck was put in?

762 A. It was after the truck was put in.

Q. How long after this telephone call from Mr. Gordon, would you say?

A. Well, I would say a matter of a week, a little more or less.

Q. Tell us what happened on that occasion.

A. I received a phone call from Mr. Gordon, and he asked me if I would be around awhile, and I told him that I would, and he said the people who have the truck back there want to get in the garage, "Will you let them in?"

And I told him that I would.

Q. And did they appear?

A. A young man appeared at the door and asked for Ken.

I answered the door at the time when the doorbell rang, and he asked for Ken, and I told him that I was Ken, and he said that Mr. Gordon had sent him out, and I said, "O. K., I will go with you."

Q. Did you know him prior to that time?

A. No, sir, I had never seen him.

Q. Did he indicate in any way that he had seen you or knew you?

A. No, sir.

763 Q. Now, this was at the front door of 215?

A. At 215.

Q. Did you immediately walk out with him?

A. Yes, I did.

Q. What did you see? Did you walk into the alley alongside of your building?

A. Yes, I did.

Q. What did you see there?

A. I passed a car with a man sitting in it.

Q. Did you know that man?

A. No, sir.

Q. And did he greet you in any fashion?

A. No, sir.

Q. Did he indicate in any manner that he knew you?

A. No, sir.

Q. And what happened then?

A. The young man and I went to the rear of the building, and I unlocked the door of the garage, and he went back for his car. He said he was going back to get his car.

Q. And did he bring the car around?

A. Yes, he did.

Q. And tell us what transpired at that point.

A. At that point the older man got out of the car
764 and said something to the younger man.

Q. Did you hear it?

A. No, I didn't hear it.

Q. Go ahead.

A. The young man went into the garage and pulled some cases off the back of the truck and set them or started setting them to the side. Then he got into the truck, and he asked me to give him a hand. So he handed me some cases, and I put them on the floor.

Q. Then what else happened?

A. He got out of the truck and started to carry a case out, and he said, "Why don't you drive the truck out and I will back the car in," and I said that I would, and I got into the car, into the truck, the keys were in it, and I pulled it out of the garage, turned it to the left, and parked it.

Q. How far down the alley did you pull it?

A. Oh, a matter of fifteen or twenty feet.

Q. Now, did you notice at that time whether the truck was completely covered? Were all sides of it, including the back, closed?

A. Yes, sir, the back, as I recall, had a piece of canvas hanging down.

Q. And what happened? I understand now that the
765 other man, the younger man, backed the Buick in there, into the garage?

A. Yes; he backed it in.

Q. What kind of a car was it, or do you know?

A. As I recall, it was a Buick. I don't remember much more about it. It was a large car, and very new. It was a new car of some kind.

Q. And what happened then?

A. He went back in, and the young man, the younger

man of the two, started to putting the film into the car, into the truck of the car; and when he finished that he started putting the film into the back seat of the car, and to expedite matters, I picked up a few of the cases and handed them to him until the automobile was loaded in the back seat.

Q. And then what occurred? Did they leave?

A. Yes, they left. I don't recall; just they got into the car and drove it right out, or whether one of them stood outside and guided it while it got out of the garage, but just prior to that the old man asked if it was all right to take the key that was still hanging in the lock, and I told him it was all right.

Then when they got the car out, I told them I would back the truck in and lock up, and I did that, backed 766 the truck up and closed the door and locked the padlock.

Q. Now, did you see the truck in the garage again after that?

A. I might have seen it. I don't recall whether I went into the garage during the time—I went in there at one time, but I think it was afterwards—yes, sir, I would say afterwards that it was in there.

Q. Now, what were these packages that you handled?

A. They were marked, the ones that I noticed were marked "Kodak."

Q. Something like the cases that were shown here in the courtroom?

A. Something like those, yes.

Q. And did you read the instructions particularly?

A. No, I didn't read them. I wasn't interested.

Q. Was there any discussion concerning the contents?

A. No, there wasn't.

Q. Was there any discussion concerning the destination of these men when they left the garage?

A. No, sir.

Q. Did they tell you their names?

A. No, sir.

Q. Had Mr. Gordon told you their names?

767 A. No, sir.

Q. In other words, you relied simply on the fact that he told you he was a friend of his?

A. That's right.

Q. Now, did you know where they were going when they left the garage?

A. No, sir.

Q. Now, did you know whether or not the material they had in the car when they left, and the material in the truck, was stolen?

A. No, sir.

Q. Was there any discussion with them or with anybody else prior to that time that would lead ~~me~~ to believe that was stolen?

A. No, sir.

Q. Did you own any of that material?

A. No, sir.

Q. Did you possess it or have control over its disposition?

A. No, sir.

Q. Did you receive any money in connection with that transaction?

A. No, sir.

Q. Was there any hope of compensation held out 768 to you to help them load the car or any—

A. No, sir.

Q. Now, how long did the truck stay in the garage?

A. I don't know how long it stayed there.

Q. Well, when did you discover that it was gone?

A. It was a couple of weeks later. I tried to get into the garage, and the lock—I couldn't work my key in the lock, and I tried the other door, and the inner door was locked, too.

Q. Let me ask you a question at this point: Just inside this pedestrian door on Government Exhibit 87, and to the right, is there a door that enters into the garage?

A. Yes, sir.

Q. And what means of security is there on that door, as far as a lock is concerned? Is there a lock or a locker—

A. There is a hasp for a padlock.

Q. You tried to get in it through that door a few days later?

A. Yes.

Q. About two weeks later?

A. About two weeks later, I would say.

Q. And you were unable to get in?

769 A. That's right.

Q. The door was secured?

A. That's right.

Q. And your key would not work in the big door?

A. That is right.

Q. What did you do about that?

A. I called Mr. Gordon and told him that I couldn't get in, and he said that maybe they had changed the lock.

Q. What did you do about that?

A. I had to get into the garage, and I took a hammer and broke the lock.

Q. Why did you have to get in?

A. I had some lumber in there that I needed, and had to bring it into the building.

770 Q. Now, you were present when Agent McCormick and Agent Higgs testified?

A. Yes.

Q. You recall the date, November 8th?

A. Yes.

Q. Do you recall the date of November 8th as the date that you met the FBI?

A. I recall it as both.

Mr. Downing: Objection, Your Honor, to the latter remark of counsel, 'the date he met the FBI.' I don't think that is a proper question.

The Court: Objection overruled.

By Mr. Walsh:

Q. Will you tell us what happened when you first saw Mr. Higgs that day?

A. Mr. Higgs in the company of another agent came to my door and had me identify myself, which I did, and asked if I would come with them to their office; that they wanted to talk to me for awhile.

I told them that I would if they would permit me to get dressed and they asked if they could come in and I invited them in.

When they were in they told me that they would. They did not want me to make any phone calls to anyone
771 whomsoever.

Q. Did they tell you you were under arrest?

A. No, they didn't.

Q. Go ahead.

A. When I was dressed I started out. I told them that I had to go over to the girls' club and check on the hot water heater which was giving us trouble the day before and asked them if that would be all right if we stopped there first and I made a check on the thing.

They agreed to it and dropped me over there.

By the way, when we came out of the door there was

another agent standing by the car in which I rode, making four in the car that I went in.

Q. Which way did you leave your building, the front entrance or back?

A. On the day we left through the back entrance.

Q. Are there two entrances to your living quarters?

A. Yes, there are.

Q. One out on Lake Shore Drive, is that right?

A. It is a Lake Shore Drive address; actually the entrance is on Division Street.

Q. On Division Street?

A. That is right.

Q. And the other is in the alley?

772 A. That is correct.

Q. And which do you usually use?

A. When I go to the girls' club normally I go out through the building to check for mail and go out that door, but when I am coming back from that part of town I come in and usually check for mail and packages and come in that door. If I am going west to Division Street and State or down to the subway, I use the back door.

Q. This day you used the alley, back door?

A. This day I used the alley.

Q. You drove—where did you drive? There were four of you, three agents and yourself?

A. That is right.

Q. Where did you go?

A. We got into the car which was parked on Stone, which is just east of the 1200 building, on the corner of Division and Lake Shore Drive. The car was parked on the west. I mean the street is just west of that building. The car was parked facing Division Street on the west side of Stone Street. We drove to State Street, down Division to State, up State to Erie Street. We turned left on Erie Street and came to the address 215, turned right into the

773 alley and parked beside the building.

Q. How many of you went into the building?

A. I went in with Agent Higgs and one other agent.

Q. Do you know who he was?

A. No. He is not here.

Q. Was there a conversation there at the building?

A. Yes, there was.

Q. Tell us what they said and what you said, what each of them said.

A. Now, Agent Higgs said—

Q. Tell us what Agent Higgs said.

A. Agent Higgs told me in that building—I said, “What is this all about?”

Agent Higgs said, “Don’t you know?”

And I said, “No, sir.”

He says, “You have been dealing in stolen films.”

I said, “I have not.”

He says, “We want you to come with us down. We are going to see about it.”

Then at that time, I said, “In that case, there is nothing further I can discuss about this case because you are accusing me of a crime and I do not want to say anything 774 that will be used against me as I have been told such things by attorneys,” and I refused to discuss that matter with him.

Then he got into the rooming house business, which I discussed freely with him as to the ownership and how it was operated and so forth, and other than that I don’t recall anything now.

Q. Then, where did you go? That is the substance of the conversation, is it, that occurred there?

A. Yes, sir.

Q. Did the other agent take part in it?

A. Oh yes, sir. By the way, before we got out of there, I did tell him there that I did not want to go down to their office under the circumstances unless I had counsel.

Mr. Higgs immediately got on the telephone and called Mr. McCormick.

Mr. McCormick came out and several others. By the time the affair was over there were at least three cars and at least six agents in the building or around the building. And at that time Mr. McCormick brought out a picture of me carrying a package into the building.

Q. This was at 215 East Erie?

A. This was at 215 East Erie Street.

775 Q. Did he say anything?

A. He asked me if that was me and I said Yes.

And he says, “We have been watching you and this is a picture of you carrying the film into the building.”

Q. Well, now, did you see the package?

A. Yes, sir.

Q. That you were carrying in this photograph?

A. Yes, sir.

Q. Was there anything about the package that would indicate that it was film?

A. No, sir.

Q. Or Kodak?

A. No, sir.

Q. Material?

A. No.

Q. Of any kind?

A. No, sir.

Q. And had you ever carried film into the building?

A. No, sir.

Q. What did you say to Mr. McCormick?

A. I told Mr. McCormick that was not film in there; it couldn't be because I had not carried any into the building.

776 He said, "Well, what is it?"

I told him it could be anything in the way of supplies that I frequently carry in through that particular door of which the picture was taken.

Q. Was there an automobile in that picture?

A. There was.

Q. What kind?

A. Oldsmobile.

Q. Whose car is that?

A. Mr. Gordon's.

Q. Your partner in the rooming house?

A. Yes, sir.

Q. Where did you go when you left 215—

The Court: I think this would be a good point to suspend. If you get into the other thing we will stop anyway in another few minutes. Don't you think it would be better to stop here?

We will recess until 2 o'clock this afternoon.

(Whereupon, at 12:30 o'clock p.m. a recess was taken until 2 o'clock p.m. of the same day, being Tuesday, June 5, 1951.)

777

Before Judge Campbell and a Jury,

Tuesday, June 5, 1951,

2:00 o'clock, p.m.

Court met pursuant to recess.

Present:

Honorable Otto Kerner, Jr.,

U. S. District Attorney,

By: Robert J. Downing,

Assistant U. S. Attorney,

On behalf of Government;

Mr. George F. Callaghan,

On behalf of Defendant Gordon;

Mr. Maurice J. Walsh,

On behalf of Defendant MacLeod.

778 (The following proceedings were had in the presence of the jury:)

The Clerk: No. 50 CR 641, United States vs. Gordon and MacLeod, on trial.

Mr. Walsh: Take the stand, Mr. MacLeod.

The Court: You may proceed, Mr. Walsh.

KENNETH J. MAC LEOD, one of the defendants herein, having been heretofore previously sworn, resumed the stand and testified further as follows:

Direct Examination (Continued)

By Mr. Walsh:

Q. You are the same Kenneth MacLeod who was testifying when court adjourned here, are you?

A. Yes, sir.

Q. Now, prior to leaving 215 East Erie with Agent Higgs, and his associates, did you make any telephone calls?

A. Yes, sir.

Q. On November 8th?

A. Yes, sir.

Q. And whom did you call?

A. I called an attorney.

Q. What was his name?

779 A. Michael Brodtkin.

Q. Did you tell him that the agents were there?

A. Yes, sir. I told him what the story was.

Q. Did he advise you?

A. Yes, sir. He advised me.

Q. Never mind. Did he, or did he not, advise you?

A. Yes, sir.

Q. After that—Incidentally, during the time that you were there, did Mr. Higgs or any of the agents that were with him ask you in effect this question:

"MacLeod, are you always this quiet?"

A. That question was asked later. The question that was asked me—

Mr. Downing: Objection, your Honor.

By Mr. Walsh:

Q. Was this question asked you in effect:

"Don't you even want to talk about the weather?"

A. Yes, sir.

Q. Then you went to the FBI office, is that right?

A. Yes, sir.

Q. And how many agents went with you then?

A. There was a man driving the car. I don't know whether he was an agent or a chauffeur. This agent—

780 Q. Mr. McCormick?

A. Mr. McCormick sat beside me in the back seat and there was another agent in the front seat.

Q. Now, you arrived, what time did you arrive at the Bureau office, if you know?

A. I don't know.

Q. Well, what occurred there?

A. I was asked to explain why there was some stolen film in the garage.

Q. What did you say?

A. I told them I didn't care to talk about anything unless I had an attorney in my presence.

Q. And how long did your conversation with them continue?

A. I was there, oh, I would imagine two or three hours.

Q. Were your fingerprints taken?

A. Yes, sir.

Q. At the FBI office?

A. Yes, sir.

Q. A photograph taken?

A. Yes, sir.

Q. Now, during that time did they show you any photographs at the FBI office?

A. No, sir.

781 Q. Did they show you a picture of Mr. Marshall who testified here the other day?

A. No, sir.

782 Q. Now, when Mr. Marshall took the stand, did you know him?

A. No, sir.

Q. Well, having heard him testify, do you now recog-

nize him as the person who called on you on July 27th or thereabouts, late in July?

A. Yes.

Q. Do you know Swartz, this Swartz that has been referred to here?

A. No, sir.

Q. Did anybody show you a picture of him at the FBI office?

A. No, sir.

Q. Do you know Swartz now?

A. No, sir.

Q. Do you know whether Swartz is the man that was present that day with Marshall?

A. I don't know, sir.

Q. He could be, is that it?

A. He could be.

Q. Now, after you left the FBI office, you were there about two or three hours, you say?

A. Yes, sir.

Q. And where did you go then?

783 A. I came over to this building.

Q. And still in the company of the Agents?

A. In the company of Mr. Higgs and one other Agent.

Q. And where did you go?

A. I went to the Commissioner's office.

Q. And while you were there, was a complaint read to you?

A. Yes, sir.

Q. By United States Commissioner Edwin Walker?

A. Yes, sir.

Q. Do you know whether or not that complaint was signed by Walter M. Higgs, Jr.?

A. Yes, sir.

Q. And who was present at that hearing?

A. Mr. Brodtkin, Mr. Downing, a woman clerk of some kind, the Commissioner, and as I recall to the rear of the room one or two other men.

Q. What happened to the case at that point?

Mr. Downing: If your Honor please, that is immaterial insofar as this suit is concerned.

The Court: Yes, the record will show it. What was the date of the arraignment before the Commissioner?

Mr. Walsh: November 8.

784 By Mr. Walsh:

Q. Now, did you ever on any other occasion see either Marshall or Swartz?

A. No, sir.

Q. You are not familiar with the details of Mr. Gordon's business on East Adams Street, are you?

A. No, sir.

Q. You have no connection with that business?

A. No, sir.

Q. You have never done any business with Mr. Swartz, have you?

A. No, sir.

Q. Either directly or indirectly?

A. No, sir.

Q. Now, did you on July 20, 1950, have in your possession film which you knew to be stolen?

A. No, sir.

Q. Did you on July 20, 1950, transport or cause to be transported in interstate commerce from Chicago to Detroit, Michigan, any film which you knew to have been stolen?

A. No, sir.

Q. In the value of \$5,000 or any amount?

A. No, sir.

785 Q. Did you on July 27 have in your possession film which you knew to be stolen?

A. No, sir.

Q. Did you on July 27 transport or cause to be transported in interstate commerce film which you knew to be stolen?

A. No, sir.

Mr. Walsh: You may cross examine.

Mr. Downing: Just a moment, your Honor.

Cross Examination

By Mr. Downing:

Q. Mr. MacLeod, I believe you testified that you reside at 1150 North Lake Shore Drive.

A. Yes, sir.

Q. You resided there for about three years, you said?

A. Approximately.

Q. And you were residing there back in July of 1950?

A. Yes, sir.

Q. And you were residing there again in November of 1950, or still in November, 1950?

A. Yes, sir.

Q. Now, these photographs, Government's Exhibits 79, does that illustrate a portion of the building in which
786 your residence is at 1150 North Lake Shore Drive?

A. The building to the left in the picture.

Q. And Government's Exhibit 80, does that represent a portion of your building in the entrance, one of the entrances to your apartment in the building?

A. The building to the right does.

Q. And Government's Exhibit 81, does that represent a portion of the building in which you reside?

A. The building to the left does.

Q. And it also illustrates one of the entrances to your apartment, is that right, sir?

A. Yes, sir.

Q. Now, with respect to Government's Exhibit 82, does the building to the left and to the right between the two alleys, adjoining the two alleys—does that represent a portion of the apartment in which you live?

A. Yes, sir.

Q. And this one window which is right up above the paper, what appears to be paper in the photograph, right at the corner of the two alleys, is that a window in your apartment, or one of the windows in your apartment?

A. Yes, sir.

Q. I believe you testified concerning this property
787 at 215-217 East Erie Street, that it was leased, that property, at the present time, is that right?

A. Yes, sir.

Q. And in connection with the photographs which were shown to you this morning, there is illustrated therein the garage which is in a portion of that property, is that right, sir?

A. That is correct.

Q. And it was in that garage, that double door garage in which this truck was, at the time you saw it, on July
27, is that right, sir?

A. Yes, sir.

Q. Now, that date, July 27, that is your best recollection? It was on or about that date?

A. I haven't the slightest idea it was about that date.

Q. Would you say it was on or about that date?

A. I wouldn't deny that it was that date. I wouldn't know. It was probably that date, from the testimony that has been given.

Q. Anyway, on that date it was that you saw Mr. Marshall who was a witness here, and in addition a Mr. Al Swartz?

A. I don't know about Mr. Swartz, but I saw Mr. Marshall there.

Q. Well, there was a second man along with Mr. Marshall?

A. That's right.

Q. And they came there with a note which Mr. Marshall showed you, this Government's Exhibit 83, is that right?

Mr. Walsh: I object to this. It is assuming something not in evidence.

Mr. Downing: This is cross examination.

The Court: If Mr. Marshall didn't show it to him, he may so indicate.

By Mr. Downing:

Q. Did Mr. Marshall show you this note on the date that he came there?

A. No, sir.

Q. He did not show that to you at that time?

A. No, sir.

Q. At that time that he came there, when was the last time that you had been in the garage prior to that day?

A. I wouldn't know that.

Q. Well, you had a key to the garage?

A. That's right.

Q. And you kept articles and various things in the garage, I believe you testified. Is that right, sir?

A. That's right.

789 Q. And did you have occasion in connection with the operation of this building to frequently go into the garage?

A. Not frequently, but occasionally.

Q. Well, what is your recollection as to approximately how many times in a week you would go in back there, in the summer of 1959?

A. I might have gone in there once a week, and maybe some weeks maybe every day, and I might not have gone in there for two weeks.

Q. There could be a period of time in which you might be there every day, and then again—

A. There could have been.

Q. So you wouldn't say that just prior to July 27th that you had not been in there for two weeks, or that you had been in there every day prior to that?

A. I was not in there every day just prior to that.
790 Q. Well, how do you recall it?

A. Because sometime before then I received this call from Mr. Gordon and he told me that someone was going to be out with a truck and that was approximately a week before then and I do not recall seeing that truck prior to that day.

Q. And did he tell you who was coming out with the truck?

A. No, he didn't.

Q. What did you do with respect to—

Mr. Downing: Strike that.

By Mr. Downing:

Q. General, did you keep the garage door or this double door locked?

A. Yes, sir.

Q. What did you do with respect to making it available for bringing the truck in at that time?

A. I went to the rear of the building, unlocked the lock, and left it hanging in the hasp.

Q. Did you customarily do that when people wanted to come into the garage?

A. No.

Q. Generally speaking, it was always locked, is that right?

791 A. Generally speaking, it was.

Q. And in this particular instance, you unlocked it and left the lock hanging in the hasp there?

A. I did.

Q. Thereafter, did you check to see whether the garage was still locked?

A. No.

Q. When did you next go back to check the condition of the garage with respect to whether or not it was locked?

A. I didn't.

Q. You didn't go back after you unlocked the lock until approximately the day, until exactly the day that these two men came there, approximately a week later?

A. I might have passed by there. That I do not recall. I have no reason to recall it.

Q. You didn't specifically go back to see whether the garage was locked or unlocked?

A. That is right.

Q. Approximately what time of the day was it when you left the garage unlocked?

A. It was very late in the afternoon.

Q. Did you remain there on the premises on that day?

A. No, I didn't.

792 Q. What day of the week was that, do you recall?

A. No, I do not recall.

Q. Approximately what hours back in the summer of 1950 were you around the premises of 215 and 217 East Erie?

A. That is a question that is impossible to answer. I was there every day at no particular time, but normally I would say that you could find me at that address sometime after 11 o'clock in the morning, until oh, sometimes two, sometimes five or six, depending on how much work I had to do.

Q. It was your custom to go to the building each day, is that right?

A. That is right.

Q. That would include week-ends, Saturdays and Sundays?

A. If there was anything to do.

Q. And by things to do, what type of work did you do around the premises?

A. I came there, checked the money, rented rooms on occasion, made repairs, went out for supplies, made repairs to electrical appliances, in some cases minor plumbing.

Q. You generally looked over the entire property, is that right?

A. That is correct.

793 Q. You had an operator there by the name of Miss Jones, is that right?

A. That is right.

Q. She actually operated ~~the~~ place from day to day, is that right?

A. No. She was there to answer the door bell and the telephone.

Q. She was sort of like a switchboard operator, is that right?

A. You might say that is it.

Q. You actually handled the renting of the premises, that is, for the rooms?

A. Not in every case, because I was not there.

Q. You did watch and care for the maintenance and upkeep of the building?

A. Not all of it myself. I had a janitor there who did some. He was not any experienced electrician. He was an

elderly man. I had to show him many things to do, a lot of things he couldn't do.

Q. That did cause you then to go around the building and assist in the upkeep and observe and supervise in the upkeep of the building, is that right?

A. That is correct.

Q. Now, do you recall for the week prior to the 794 time that you unlocked this door, unlocked the lock rather, and left it hanging there in the hasp, how many times you were in that garage during that week previous to that?

A. No, I don't.

Q. Would you say that you were not in that garage at that particular time during that week prior to that time?

A. I would say that I don't recall being in the garage from the day Mr. Gordon called me about the truck coming over until the day I went in with the men who came out.

Q. Now, the week prior to when Mr. Gordon called you, do you remember being in the garage?

A. I do not recall.

Q. Would you say you were in the garage during the week prior to the time Mr. Gordon first called you about the men coming out?

A. I would not say I was or I was not. I can't remember that far back on that particular day.

Q. At this time you don't remember?

A. I don't remember.

Q. When Mr. Gordon called you, did he tell you what kind of a truck was coming up with this merchandise or whatever it was that they were bringing?

795 A. He did not tell me they were bringing any merchandise.

Q. What did he tell you?

A. He told me a truck.

Q. All right.

A. He described it to me as a newspaper delivery truck.

Q. All right. Is that all he told you about the truck?

A. That is all.

Q. He did not tell you who was bringing it up or what was, if anything, on the inside?

A. No, sir.

Q. Did he tell you what the license of the truck was?

A. No, sir.

Q. Did he tell you what the license of the truck was?

A. No, sir.

Q. Now, when did you first see the truck?

A. I can't give you a date.

Q. Well, in relation to the events about which you have testified, when was it?

A. The day that Mr. Marshall came to the door.

Q. That was the day that both Mr. Marshall and another man came there, about which you have previously testified?

A. That is correct.

796 Q. That is the date that you first saw this truck, is that right?

A. Yes, sir.

Q. Is that the first time that you had occasion to go into the garage following the time that you left the lock open there on the hasp that you have testified, a week prior to that?

A. Yes, sir.

Q. When you went around to the garage who opened the garage door?

A. I did.

Q. Did Mr. Marshall have a key to the garage?

A. No.

Q. Did this other gentleman have a key to the garage?

A. No, sir.

Q. So that you opened the garage door at that time?

A. That is right.

Q. You had to unlock it at that time, is that right?

A. That is right.

Q. Now, when you went into the garage, what did you see inside?

A. A truck.

Q. Well, will you describe the truck that you saw?

A. It was an old truck. I couldn't state how many 797 years old.

Q. Was it a panel or stake body?

A. I don't know what you would call a stake body. A panel if it was enclosed the sides and top, it was.

Q. Something similar to newspaper trucks on the street?

A. Something like a Daily News, small truck that runs around.

Q. Was it about that size?

A. About that size.

Q. By Daily News, you mean the Chicago Daily News newspaper trucks, is that right?

A. Yes.

Q. What did you do after you went on the inside of the premises?

A. I watched for a minute.

Q. What took place? What did you watch?

A. Mr. Marshall pulling some cases off the back end of the truck and setting them off the side.

Q. Did you have any conversation with Mr. Marshall at that time?

A. No.

Q. Neither of you said anything at that time?

A. No.

798 Q. How many cases did he pull off from the back of the truck to the side?

A. Well, I don't recall.

Q. What is your best estimate at this time?

A. It looked like a stack about the size you had up here the other day. They were full cases that were sitting there.

Q. You mean ten full cases?

A. I imagine about ten, more or less.

Q. Approximately?

A. It could have been.

Q. Did you see any inscription on the cases?

A. Yes.

Q. What was the inscription you saw on the cases?

A. Kodak.

Q. Is that the only inscription you saw?

A. No.

Q. What else did you see?

A. I saw some black print.

Q. Black print similar to the type that is on the cases in the court room. Did Mr. Marshall pull all ten of those?

A. Yes.

Q. Did he pull all the ten cases out of the truck and put them on the floor inside the garage?

799 A. Those that I just now described.

Q. Were some more placed on the floor?

A. Yes.

Q. Who placed those on the floor?

A. I placed those on the floor.

Q. Did he ask you to assist him?

A. Yes, he did.

Q. What did he ask you at that time?

A. He got into the truck. He said, "Will you give me a hand?"

I said, "Sure."

Q. All right, what took place?

A. He passed out some more. I set them down on the stack.

Q. Approximately how many did he pass out, do you recall?

A. No, I do not recall.

Q. Was it equal to the number that was already sitting out there on the garage floor?

A. I don't think so. I don't know.

Q. You would say it was less?

A. I wouldn't say it was more or less.

Q. You do not have any present recollection?

800

A. No.

Q. Were those also Kodak film boxes?

A. I don't know. They might have been.

Q. Would you say that they were or were not?

A. I would not say they were. I would not say they were not.

Q. They were similar to the type of box that had already been placed out there by Marshall?

A. I would not say they were not.

Q. You do not have any present recollection, is that right?

A. No.

Q. And then what took place after all these cases were passed out inside of the truck to you? Did you place them on the floor there in the garage?

A. I did.

Q. What happened?

A. Mr. Marshall asked me, he said, "If you will drive the truck out, I will back my car in."

Q. Did you accommodate him?

A. I did.

Q. You got in and drove the car or truck out, is that right?

A. That is right.

801 Q. The keys were in the truck, were they?

A. They were.

Q. Mr. Marshall, when you pulled the truck out, Mr. Marshall went around to his car, did he?

A. Yes, he did.

Q. Where was the second individual at that time?

A. He was standing around in general. I couldn't say where he was. I did not pay a great deal of attention to him.

Q. Did he get into the car or truck when you either moved the truck out or Marshall pulled the car in?

A. He didn't get on the truck with me.

Q. He didn't get on the truck with you?

A. No.

Q. Did you have any conversation with him at all?

A. Yes.

Q. What was the conversation?

A. He asked me if I could take the key that was still in the lock.

Q. In what lock?

A. In the padlock.

Q. Was there a key in the padlock?

A. Yes.

802 Q. Was that the key that you brought and opened up the door with at that time?

A. Yes.

Q. Did Mr. Swartz ask you, or this other man ask you about some figurines that were in the garage at that time?

A. I don't recall.

Q. Did you have some figurines in the garage at that time?

A. There could have been.

Q. You had had some figurines in the garage around that time, is that right?

A. I don't recall whether they were there then or not.

Q. What is your best recollection? Would you say you did not have any at or about that time?

A. No.

Q. You don't recall one way or the other definitely, is that right?

A. No, I don't.

Q. And then, after the car, after you had this conversation with Mr. Swartz, or this other man, about this key, what happened to the key?

A. He took it.

Q. He took the key?

803 A. Yes.

Q. Did you have any other key to the garage?

A. Yes, I did.

Q. To the padlock there on the hasp?

A. Yes.

Q. And then, after the Buick was pulled into the garage, then what took place?

A. The younger man started, he put the film into the back end of the truck. I was watching him. Then when he started putting it into the back seat I helped him.

Q. You helped him load this merchandise into the back seat?

A. I handed it to him. He put it into the back seat.

Q. Approximately how much of the back seat was filled with the film at that time? Come up to, would you say the window level?

A. About the window level.

Q. Approximately the window level?

A. They were sitting on the floor and on the back seat?

Q. Did he put some in the trunk too?

A. Yes.

Q. And then what happened after the film was placed into the car?

804 A. They left.

Q. Approximately how long were they there that entire period of time?

A. No more than say, fifteen minutes or so.

Q. Did you have any conversation with him when you finished loading the film?

A. No, except that I said that I backed the truck in and lock it, if they wanted.

Q. You told that to the man?

A. I told that to the man.

Q. What did they say?

A. They said O.K.

Q. Was there some film still on the truck at that time?

A. I don't know.

Q. You can't recall? Would you say there was?

A. I don't know.

Q. Would you say there wasn't?

A. I didn't see into the back end of the truck.

Q. You didn't see into the back end?

A. No.

Q. Did you go into the back end at the time that Mr. Marshall was handing out the cases to you?

A. No, I didn't.

805 Q. Where were you at that time?

A. I was at the side of the truck. The truck was backed into the garage so that it was clear. You couldn't

stand in back there and stack the film. It had to be set to the side and that was why he asked me to help him.

Q. How did Marshall get the film out when he was taking it out alone?

A. He was taking the film that was sitting on the back end.

Q. On the gate back there, is that right?

A. I don't know whether it was on the gate or not.

Q. You did not look into the truck at all, is that right?

A. No, sir.

Q. That is into the back, the panel part of the truck?

Mr. Walsh: I think that has been answered.

By The Witness:

A. No.

The Court: That may stand.

By Mr. Downing:

Q. Now, when the truck was backed into the garage, had the men departed by that time?

A. Yes.

Q. They had pulled out and that was the last you saw of them?

A. That is right.

Q. After they pulled out, you went over and backed the truck in, is that right?

A. Yes.

Q. And you just left the keys in the truck?

A. Yes.

Q. Then, you locked the garage door?

A. Yes.

Q. Then, I believe you said that you did not have occasion to go back into the garage again for two weeks, is that right?

A. No, sir, I didn't say that.

Q. Maybe I misunderstood you. What did you say about that?

A. I said I am not sure I did not go in there. I have a recollection of probably having gone in there to take some lumber out, because, as a matter of fact, I am sure of it because I had to lift it over the front end of the truck to get it out.

Q. Approximately how long was that after this date?

A. It might have been the next day or so.

Q. Do you recall any other incident of going in there?

807 A. No.

Q. So that the only time within that two weeks period that you had gone into the garage, that is two weeks following the date to which you have described when the Buick was brought into the garage?

A. Would you repeat that?

Q. Let me rephrase it.

After the date that Mr. Marshall was there that you recall when the Buick was backed into the garage, I say at the time you went in and brought the lumber in or out of the garage, were you in there at all within two weeks from the time Marshall was there?

A. Not that I recall.

Q. That was the only time that you recall going in there?

A. Yes.

Q. At the time you went in there with the lumber or for the lumber, whichever it was, you unlocked the door yourself at that time, is that right?

A. Yes, sir.

Q. Now, you recall with respect to this truck, when did you last see it in this garage?

A. That would have been the last time.

Q. And that was a day or two after?

808 A. That is right.

Q. Marshall was there, is that right?

A. That is right.

Q. Was this somewhere around the 29th of July that Marshall was there on the 27th?

A. He was there on the 27th, that is correct.

Q. Approximately how long was it after the date, that is the 29th, was it when you noticed that the truck was gone?

A. I would say a couple of weeks or so.

Q. Two weeks from then?

A. Yes.

Q. That would be some time around the 12th of August, approximately, just approximately speaking?

A. Approximately, I would imagine.

Q. And did you go into the garage at that time when you first noticed that the truck was gone?

A. Yes.

Q. What did you do when you discovered that the truck was gone? Did you notify Mr. Gordon?

A. Yes. Told him it was gone.

Q. Did he tell you anything about his knowing that the truck had been removed from the garage?

A. No, sir.

Q. What did Mr. Gordon tell you at the time you 809 told him?

A. He said they probably have the truck.

Q. Did he mention any names?

A. No.

Q. Did he say anything else about his knowing anything about the truck at that time?

A. No, sir.

Q. Did he tell you anything about his knowing about their coming after the truck?

A. No, sir.

Q. And after that time did you and Mr. Gordon ever discuss that truck again?

A. I think I asked him if he ever collected the rent for it.

Q. How much rent did you charge for it?

A. I did not charge anything.

Q. How much did Mr. Gordon charge, if you know?

A. He was supposed to ask them \$20.

Q. How do you know that?

A. He told me.

Q. When did he tell you that?

A. Oh, I don't recall whether it was a day or so later, or when.

Q. A day or so later from when?

A. It is possible, I don't know.

810 Q. A day or so later from when?

A. From the date I left the garage door open.

Q. That is the first time you knew of the truck coming in there, is that right?

A. Yes.

Q. Did he tell you to collect the rent or that he would collect the rent?

A. He didn't say.

Q. He just left that part of it in the air, is that right?

A. I assumed he would collect it. He had arranged for the space.

Q. Did he tell you the name of the renter of the space at that time?

A. No.

Q. Did you see any address on the truck?

A. Yes.

Q. What was the address on the truck?

A. I don't recall.

Q. To refresh your recollection, was it 4111 South Pulaski?

A. I would not remember that.

Q. You would not say it was, or was not?

A. That is right.

811 Q. But it had an Illinois license plate on it?

A. I don't know.

Q. You recall as you have testified having met Mr. McCormick and Mr. Higgs on the 8th of November, is that right?

A. That is right.

Q. You went down to the office of the FBI on the late morning of the 8th of November, is that right?

A. The late morning or early afternoon.

Q. Sometime around noon?

A. Yes.

Q. On the 8th of November?

A. Yes.

Q. After you reached the office of the FBI on that day, you, Higgs and McCormick had a conversation at that office, is that right?

A. That is right.

Q. They asked you some questions about whether or not there had been any film in the garage at 215 to 217 East Erie, is that right? Do you recall that?

A. They asked me if there was any stolen film in the garage.

Q. Is that the only conversation they had?

A. That is the conversation I distinctly remember.

Q. Do you recall their asking you as to whether or not there was any film in the garage in July of 1950?

A. Yes, they probably asked that question.

Q. Did you tell them that there was film in the garage?

A. I did not answer their question. I told them I desired counsel. They charged me with a crime. I desired counsel.

Q. They had charged you with a crime?

A. That is correct.

Q. Did you give that answer to each and every question they propounded to you on that day?

A. No.

Q. Now, you did permit yourself to be photographed at that time?

A. I did not permit myself. I was told to go in and get my fingerprints and photograph taken.

Q. You were in there and were fingerprinted and photographed, is that right?

A. That is correct.

Q. You thereafter met Mr. Higgs at the Palmer House two or three days later and you signed the card, is that right?

A. That is right.

Q. Nobody forced you to meet him at the Palmer 813 House, did they?

A. No.

Q. You went there voluntarily, is that right, sir?

A. That is correct.

Q. Now, at the time on November 8, 1950, did they ask you whether or not you knew a Mr. James Marshall?

A. They did.

Q. What did you answer to that?

A. I did not.

Q. Did they show you any photographs of James Marshall?

A. No, sir.

Q. Did they show you any photographs at any time on that day?

A. Yes, they did.

Q. Where did they show you the photograph?

A. They showed me a photograph of 215 East Erie. It was a photograph of myself.

Q. Who showed you that photograph?

A. This gentleman.

Q. By this gentleman, you are referring to Mr. McCormick?

A. He pulled it out of an envelope in which there were several pictures.

Q. Let us get the record. Was this gentleman you 814 are referring to Mr. McCormick, is that right? That is the gentleman sitting right behind me at counsel table?

A. That is correct.

Mr. Walsh: Let the record show he is identifying Mr. McCormick.

The Court: Let the record so show.

By Mr. Downing:

Q. That is of 215 East Erie Street that he pulled this photograph out and showed it to you, is that right?

A. That is right.

Q. Did he only show you one photograph there?

A. That is right.

Q. I believe you testified that that was a photograph on which you were taking something out of Kenneth Gordon's car, is that right?

A. That is right.

Q. Do you know when that photograph was taken?

A. I have not the slightest idea.

Q. Was that taken in the rear of 215 East Erie Street?

A. That is right.

Q. Now, at the office of the FBI they did not show you in there any photographs, is that right?

815 A. They did not.

Q. Was that the only time on November 8th that they showed you any photographs here at 215 East Erie St.?

A. That is right.

Mr. Callaghan: I submit that he is repetitious.

The Court: Overruled.

Mr. Walsh: These things have been answered.

The Court: Overruled. Proceed.

By Mr. Downing:

Q. I believe you testified on direct examination that someone told you that they did not want you to make any 'phone call whatsoever.

Do you recall their making that statement?

A. That is correct.

Q. Who told you that?

A. Mr. Higgs.

Q. Where did he tell you that?

A. In my apartment.

Q. Thereafter, however, they did not object to your calling this Mr. Brodtkin, as you testified, is that right?

A. They had no—they objected, yes, but it did not do them any good.

Q. They objected. What did they say to you?

816 A. They said, "Wait until we call Mack."

Q. Who said that?

A. Mr. Higgs.

Q. Where did he say that at that time?

A. He said that in the front room at 215 East Erie Street.

817 Q. Who all was present at that time?

A. Miss Jones, Mr. Higgs and one other agent.

Q. Mr. McCormick wasn't present at that time?

A. No, he wasn't there.

Q. You thereafter went and called Mr. Brodtkin, is that his name?

A. Yes, I did.

Q. That was while you were at 215 East Erie?

A. Yes, sir.

Q. And that was before you went down to the FBI office, is that right?

A. Yes, sir.

Q. Now, when you made the statement that you didn't care to talk unless your attorney was present, who did you make that statement to?

A. Mr. Higgs.

Q. And where did you make that statement?

A. 215 East Erie Street, and at the FBI offices.

Q. And who was present at the FBI office at that time you made that statement?

A. Mr. Higgs, and besides Mr. Higgs was the agent that was with me at the time that I was asked to go down to the FBI office, at my home.

Q. You don't recall his name, do you?

818 A. No, I don't recall his name.

Q. Who else was there at the office?

A. I do not know whether Mr.—I cannot remember this gentleman's name.

Q. McCormick?

A. McCormick was in the room at the time or not, nor a third—I mean a fourth man who came in and out. I don't know whether he was in there at that specific time or not.

Q. You don't know this other man's name that you are referring to, do you?

A. No, he has been in the courtroom, though.

Q. Were you introduced to him at that time?

A. No, I wasn't.

Q. Do you see him in the courtroom at the present time?

A. No, he is not here now.

Q. He is not here at the present time. And with respect to all of the questions that were asked you at the FBI office, I am not quite clear, did you give them this answer that you didn't care to talk unless you had your attorney present?

A. I told them that once or twice, and the rest of the time I answered nothing; I just remained silent.

Q. What did you call answering questions to, if 819 any? Did you answer any questions at the office?

A. None whatsoever.

Q. So there wasn't anything that you said at the office of the FBI?

A. Not in connection with the film that they accused me of having possession of.

Q. Well, how about your association at 215 East Erie Street, did you talk to them about that?

A. Yes, I did.

Q. And you told them about your relationship, that is in so far as business transactions with Mr. Gordon in the operation of 215 to 217 East Erie Street?

A. That's right.

Q. And is that in substance as Mr. McCormick and Mr. Higgs have testified to here?

Mr. Walsh: I object to that because they didn't testify to the same thing.

The Court: State your question in a direct form, rather than paraphrasing the testimony of another witness.

Mr. Downing: All right, Your Honor.

By Mr. Downing:

Q. Now, with respect to your interest at 215-217 East Erie, at that time—that is in July of 1950 and in 820 November of 1950—you were in partnership with Mr. Gordon, as Mr. McCormick and Mr. Higgs testified, is that right, Sir?

A. Yes, I was; not as they testified, but I was in partnership with him.

Q. Was your partnership arrangement different than they testified?

A. How do you mean?

Q. You said "not as they testified." To what do you refer?

Mr. Walsh: I object. They didn't testify to the same thing with regard to the division of money.

The Court: If he doesn't understand the question, he may say so.

Mr. Walsh: I object unless counsel states what they testified.

Mr. Downing: If Your Honor please, the answer to the question before my question, it appeared this man said

that these men, that this witness said, "Not as they testified." Now, if it is different, he must have something in mind. He must have something in mind. So I want—

821 The Court: I will sustain an objection to the last question. Do you have another?

By Mr. Downing:

Q. What were the details of your partnership arrangement with Mr. Gordon?

A. We were equal partners.

Q. By that, do you mean that you shared the divided profits fifty-fifty?

A. That's right.

Q. And that was the relationship that existed both in June, July and November, 1950?

A. That's right.

Q. No, at the office there of the FBI, were you asked with respect to whether or not there was a truck in your garage in July of 1950?

A. Where was that question asked?

(Question read.)

By The Witness:

A. No.

By Mr. Downing:

Q. As a matter of fact, didn't you tell Mr. McCormick and Mr. Higgs that Mr. White had rented the garage for \$20 a month?

A. Yes, sir.

822 Q. Well, were you asked that question there?

A. Where?

Q. At the office of the FBI?

A. No, sir.

Q. Where did you tell them that?

A. 215 East Erie Street.

Q. Is that the only place that you gave them that information?

A. That's right.

Q. And was Mr. Higgs and Mr. McCormick both present at the time, if you recall?

A. Mr. Higgs was present, and Mr. McCormick, I am not sure of.

Q. And you didn't tell Mr. McCormick anything about this at the office of the FBI on November 8th, or when you went to the office of the FBI on November 8th?

A. No, sir.

Mr. Downing: That is all, Your Honor.

The Court: Is there any redirect?

Mr. Walsh: There is one question that I should have asked on direct.

The Court: I will give you leave to ask it.

823

Redirect Examination

By Mr. Walsh:

Q. Mr. MacLeod, were you ever convicted of a felony?

A. No, sir.

Mr. Walsh: I think there is nothing further, Your Honor.

The Court: Yes, is there anything further on recross?

Mr. Downing: No, Your Honor.

The Court: That is all. You may step down.
(Witness excused.)

The Court: Any further evidence on behalf of the defendants?

Mr. Walsh: We have some exhibits.

The Court: You had another witness that was coming?

Mr. Callaghan: No, sir, I am not going to have a further witness.

The Court: Any further witnesses on behalf of the defendant Gordon?

Mr. Callaghan: No, Your Honor.

The Court: And on behalf of the defendant MacLeod?

Mr. Walsh: Not on behalf of the defendant Mac-

824 Leod.

Mr. Callaghan: The defendants now offer in evidence the document which has heretofore been marked Defendants' Exhibit 1 for identification.

The Court: That is the price list?

Mr. Callaghan: Yes.

825 Mr. Walsh: There is one page in the beginning that is an explanation and talks about discounts and things.

The Court: I won't admit that.

Mr. Walsh: The witness didn't testify, but he did say there were discounts.

The Court: I will not admit that. You put on evidence of the discounts. I will admit the pages that has the prices described in this indictment, if you can find that page or pages.

Mr. Callaghan: Pages 4 and 5.

I think we ought to agree that those are the material ones before we pull them out.

Mr. Walsh: Pages 4 and 5 are the pages, as far as that is concerned, 4 and 5.

Mr. Callaghan: Yes.

The Court: You are offering pages 4 and 5 of Defendants' Exhibit 1, is that correct?

Mr. Walsh: That's right, Your Honor.

The Court: Very well.

Mr. Walsh: Together with the first sheet that is in the book showing the title, "Condensed Price List Corrected to February 1, 1949, Eastman Kodak Company," and then the explanation of what these items contained on 4 and 5 mean.

The Court: That will not be received. Let me see pages 4 and 5.

Mr. Downing: I make this objection to pages 4 and 5 being received. There were numerous types of film listed on pages 4 and 5. Now, with the exception of the film with which we are concerned, I see no reason for all of the rest of that material going in. I have no objections to the prices pertaining to the film with which we are concerned.

The Court: You want the entire pages 4 and 5, together, to go in, do you?

Mr. Callaghan: Yes, Your Honor.

The Court: If they go in on page 4, page 3 which is on the reverse side of page 4, and page 6 is on the reverse side of page 5, and that would also go in. However, the jury will have before it the indictment which describes the type of film that we are concerned with here, and I should think they would be able to pick out which ones we are concerned with.

Mr. Downing: I don't mean from that standpoint. My point of view is that there is a lot of other material—

Mr. Callaghan: There is nothing harmful. It is all just prices of various kinds of film.

The Court: Well, the defendants offer pages 4 and 5, and I will admit them, and Mr. Walsh, you cross out the pages 3 and 6 just with an X across them, so to show they are not received in evidence, and I will receive 4 and 5, and let those be marked Defendants' Exhibits 1 and 1-A. The reporter may so mark them, and as so marked they will be received in evidence on behalf of the defendants.

(Said documents, so offered and received in evidence, were marked Defendants' Exhibits 1 and 1-A.)

The Court: Are there any further documents re evidence on behalf of the defendants?

Do you need me, or can I go home?

Mr. Walsh: I beg your pardon. I beg Your Honor's pardon, but there were some envelopes marked Defendants' Exhibit 4, and they were admitted as Government Exhibit 94.

Mr. Downing: That is in evidence.

The Court: I don't need that.

Are there any other documents re evidence?

Mr. Callaghan: None, Your Honor, so far as the defendant Gordon is concerned.

The Court: Is there any other evidence on behalf of the defendant Gordon?

Mr. Callaghan: The defendant Gordon rests.

The Court: As to the defendant MacLeod?

Mr. Walsh: The defendant MacLeod rests.

The Court: Both defendants rest.

Is there any rebuttal on behalf of the Government?

Whereupon, The Government, To Further Maintain The Issues In Its Behalf, Introduced The Following Further Evidence, In Rebuttal, To-Wit:

WILLIAM J. McCORMICK, called as a rebuttal witness on behalf of the Government, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Downing:

Q. You are the same Mr. McCormick who previously was sworn and testified in this matter, is that right?

A. I am.

Q. Directing your attention to November 8, 1950, at that date you saw the defendant Gordon, is that right, Sir?

A. I did.

Q. At that time did you arrest the defendant Gordon?

A. I did not.

Q. Did you advise the defendant Gordon on that date as to his rights to have an attorney?

Mr. Callaghan: That is objected to as not being proper rebuttal.

By the Witness:

A. I did.

The Court: Overruled.

By Mr. Downing:

Q. Will you relate the conversation you had with the defendant Gordon with respect to his rights to have an attorney?

Mr. Callaghan: That is also objected to on the ground that it is not proper rebuttal. No question was asked of the defendant Gordon on direct or cross examination on that.

The Court: Overruled. He may answer.

By the Witness:

A. I told him he was entitled to an attorney, and we wanted to talk to him, and he said he was very glad to come to our office to be interviewed by us. Later, during 831 the interview, approximately 11:30, he told me he had an appointment with his attorney—that is in our building—at 11 o'clock on that day, and I asked him why he had not called him and told him he would be late.

Mr. Callaghan: I renew my objection. This obviously is not rebuttal evidence.

The Court: The objection is overruled. You may complete the conversation.

By The Witness:

A. (Continuing) And I told him that since he had an appointment with his attorney, he better keep the appointment, so he left our office at 11:40 in the morning.

By Mr. Downing:

Q. Did he mention the name of the attorney at that time and place?

A. He did.

Q. What was the attorney's name?

A. Mr. Callaghan.

Q. Now, directing your attention to Government Exhibit 91 in evidence, I believe you testified—

Mr. Callaghan: I object to him reviewing his testimony with him.

832 The Court: Sustained. State your question.

By Mr. Downing:

Q. On what date did you first see that exhibit?

A. November 29, 1950.

Q. And where were you at that time?

A. I was in the rear office in the store at 21 East Adams Street.

Q. And Mr. McHegan was present, as you previously testified, is that right, Sir?

A. He was.

Q. And the defendant Gordon was present, was he?

A. He was.

Q. Will you relate what, if any, conversation you had with the defendant Gordon concerning that exhibit here?

-Mr. Callaghan: That is objected to on the ground that he has already testified in the government's main case as to the entire conversation. This is a matter of repetition and not proper rebuttal.

The Court: The objection is overruled.

By The Witness:

A. I observed this piece of paper on the floor, and I picked it up, and I showed it to Gordon, and I said, "You told me that you have not used this paper, this type 833 of paper, or the name 'Liberal Loan Bank' since 1946.

How do you account for this?"

He said then that he recalled that they still did use this form as scratch pads, and that he further recalled that there were a couple of these pads on the front counter of the store that were in use as scratch pads.

By Mr. Downing:

Q. By "this paper," you are referring to—

Mr. Callaghan: I submit that this is exactly what the defendant Gordon said on his examination, and that is not proper rebuttal, and I move that it be stricken.

The Court: Denied.

By Mr. Downing:

Q. By "this exhibit," you are referring to Government Exhibit 91, is that right?

A. I am.

Q. I believe you testified concerning a conversation in—

Mr. Callaghan: I object to his reviewing the testimony of the witness.

The Court: Sustained again. State the conversation, if you had one.

834 By Mr. Downing:

Q. Did you have a conversation with the defendant Gordon on November 8, 1950, at the office of the Federal Bureau of Investigation?

A. I did.

Q. At that time did the defendant Gordon make this statement to you—

Mr. Callaghan: I object to him leading the witness.

The Court: Overruled. This is rebuttal.

Are you concerning yourself with something said on defense?

Mr. Downing: That's right.

The Court: You may proceed.

Mr. Callaghan: If Your Honor please, concerning this, I anticipate from the question something that Mr. McCormick said, the government said on their main case, did not happen. It is not a new matter injected into this case.

The Court: I can rule on it if I hear the question.

By Mr. Downing:

Q. Did Mr. Gordon explain that if he told of everyone who had stolen merchandise in the city of Chicago, it
835 would involve a great many people?

Mr. Callaghan: I object to it and renew my objection.

The Court: Sustained. That was stated on the government's case, and denied on the cross. It is repetition.

By Mr. Downing:

Q. Directing your attention to November 8, 1950, did you have a conversation with the defendant MacLeod?

A. I did.

Q. Where did you first see him on that date?

A. I first saw him at 215 East Erie Street.

The Court: What is this date again?

Mr. Downing: November 8th.

Mr. Walsh: I object again to this on the ground that it is mere repetition.

The Court: When I hear the question I will be able to rule on it, and not until then.

What is your question?

By Mr. Downing:

Q. At that place and time, did you show the defendant MacLeod, at 215 East Erie Street, any kind of photographs to the defendant MacLeod?

A. I did not.

836 Q. In your presence was any photograph illustrated to the defendant MacLeod at 215 East Erie on November 8, 1950?

A. No photograph was shown to him in my presence.

Q. I now show you Government Exhibits 95, 96, 97 and 98, marked for identification, and I ask you to look at those, and I ask you if you have seen them before?

A. I have.

Q. With respect to those—

Mr. Callaghan: Do you have any objection to me looking at those while he looks at them?

Mr. Downing: No, go right ahead.

By Mr. Downing:

Q. With respect to those exhibits, did you have those present at the time you had a conversation with the defendant MacLeod on November 8, 1950?

A. I did.

Q. Where did you have them with you at the time you had a conversation with the defendant MacLeod on November 8, 1950?

A. They were in the possession of Special Agent Higgs, who was with me at that time.

Q. And whereabouts was that at?

A. That was in the Bankers Building at Room 837 2,000, 105 West Adams Street.

Q. That is the office of the FBI, is that right?

A. That's right, Sir, one of the offices.

Q. Now, at that time and place, were those photographs, Government Exhibits 95 through 98, shown to the defendant MacLeod?

A. They were.

Q. And were they identified, that is, by the name of the person?

A. They were.

Q. Was the name of the person identified to the defendant MacLeod on that day?

A. They were.

Mr. Walsh: I object to this. He went over it on direct, and Mr. MacLeod had a different recollection of it, and so testified, and I think all he did is put in his case again on direct, and I object to it.

The Court: The objection is overruled.

By Mr. Downing:

Q. What was the name of the person you identified the photographs with, Government Exhibits 95, 96, 97 and 98, inclusive?

A. James Irwin Marshall.

838 Mr. Walsh: Kirwin?

The Witness: Irwin.

The Court: You will have an opportunity to cross examine.

Mr. Walsh: I am sorry.

By Mr. Downing:

Q. Will you relate the conversation you had with the defendant MacLeod at that time and place concerning those photographs?

A. Special Agent Higgs exhibited these photographs to Mr. MacLeod and asked him if he knew this man.

MacLeod said he did not.

Higgs then stated that his name was James Marshall, and that he was a friend of Al Swartz from Detroit, and MacLeod said that he still didn't recognize this man.

Q. Was that the substance of the conversation concerning those photographs?

A. Concerning these photographs, I believe it was.

Mr. Walsh: Now, if it please Your Honor, I will move to strike all of the conversation at 215 East Erie Street on the ground this man had been arrested for an offense apparently, and he should have been taken to the Commissioner and arraigned before he was taken to their office for interrogation prior thereto, and this is improper. Now, that it has all been disclosed in the record, I think it should be stricken.

The Court: Motion denied.

By Mr. Downing:

Q. On that date, when you had this conversation with the defendant MacLeod, did he at any time tell you that he didn't care to talk unless he had an attorney in his presence?

A. He did not.

Q. Did he refuse to answer any questions in your presence on November 8, 1950?

A. No, he answered every question I put to him, or Higgs did.

Mr. Downing: At this time, If Your Honor please, the Government would like to offer in evidence Government Exhibits 95 through 98, and they may cross examine.

You may cross examine, Mr. Callaghan.

By Mr. Callaghan:

Q. Mr. McCormick, are Exhibits 95 to 98, inclusive, the photographs we demanded yesterday and you said were in Detroit when we asked for them?

A. I think I told you—

Mr. Callaghan: Just a moment, please, now.

The Court: Let him answer.

Mr. Callaghan: Now, he may refer to his evidence, if he wishes to somewhere along the line, but I object to what he said he told anybody about this.

The Court: Do you want to withdraw the question?

Mr. Callaghan: I will withdraw the question and ask this question:

By Mr. Callaghan: *

Q. Are these pictures, Government Exhibits 95 to 98, for identification, the same photographs that you said yesterday or the day before, were in Detroit?

A. The record will show that I never said that.

Q. The jury will remember the evidence, I assume.

Mr. Downing: I object to the remarks of counsel.

841 The Court: The remarks may be stricken. Do you have any other question?

Mr. Callaghan: That is all.

The Court: Mr. Walsh.

Cross Examination

By Mr. Walsh:

Q. Mr. McCormick, did you make any reference to the Detroit office in connection with these photographs in your testimony?

A. I did.

Q. These photographs, let the record show, he is referring to Government Exhibits 95 to 98—

The Court: Correct. The record may so show.

By Mr. Walsh:

Q. As a matter of fact, didn't you tell us you believed the photographs had been returned to Detroit?

A. No, I did not. I said that the photographs were in our files, either in our files in Chicago or in Detroit.

Q. Now, I believe you testified on rebuttal here that you told Mr. MacLeod that this man was James Irwin Marshall?

A. That's right.

Q. That is the man whose picture is portrayed in
842 Government Exhibits 95, 96, 97 and 98?

A. That's right.

Q. Then he told you he didn't know him?

A. That is true.

Q. And you say he answered every question you asked him?

A. He gave me an answer to every question I put to him, yes.

Q. Did he tell you that he didn't know that any film in the garage was stolen?

A. He told me that there had been no film in the garage, that he would have known had there been.

Q. Did you ask him when he knew such film as you claimed was there, was stolen?

A. Would you repeat the question?

Q. Did you ask him whether such film as you claimed was there, was stolen?

A. At the conclusion of the interview I told him that the film we were inquiring about had been stolen. I did not tell him before that that it was stolen.

Q. Now, about this attorney business, did you go to 215 East Erie Street as a result of a telephone call from Mr. Higgs?

A. I went to 215 East Erie Street because of a 843 telephone call that I had with Assistant United States Attorney Downing.

Q. And not the result of any call from Mr. Higgs?

A. Indirectly, perhaps.

Q. But you had a call from Mr. Higgs?

A. I had a call from Mr. Higgs.

Q. And you talked to Mr. Downing?

A. That is correct.

Q. Then you went to 215 East Erie?

A. That's right.

Q. And while you were there, did MacLeod call an attorney?

A. He did not.

Q. Did he tell you he was going to call an attorney?

A. Special Agent Higgs told me that Mr. MacLeod had already called someone.

Q. Well, were you alarmed that he might have called an attorney?

A. No, had he asked me I would have permitted him to call, too.

Q. Were you aware of Agent Higgs' request to him not to call anyone?

A. I don't believe that any request like that was made.

844 Mr. Walsh: That is all.

The Court: Is there any redirect?

Mr. Downing: I have just one question, Your Honor.

Redirect Examination

By Mr. Downing:

Q. With respect to this conversation inquired about on cross examination, about the film in the garage, what all did Mr. MacLeod tell you about the film in the garage on that date, November 8, 1950?

A. I asked him if he were in the film business, and he said he was not.

I asked him if he had ever bought or sold any film, and he said he hadn't.

And I asked him if there was any film on the premises at 215-217 East Erie Street, and he said there was not, and I asked him if there was any film in the garage at 217 East Erie Street, in July, and he said there was not.

I asked him specifically if, on July 27, there had been any film in the garage at 217 East Erie Street, and he said there was not, and I asked him if there had been 845 would he have known it, and he said he would have.

I asked him if he loaded any film from the garage into a Michigan car, a car bearing a Michigan license, and he said he had not.

I asked him if he had loaded any film from the garage at 217 East Erie Street into any car, and he said he had not.

During the month of July, and more specifically on July 27th—

Q. Is that the extent of your conversation concerning the film on November 8, 1950?

A. Later on I informed him that the film had been stolen.

Q. But that was after all these questions and answers were given, as you testified, is that right?

A. That's right.

Mr. Downing: That is all.

The Court: Any recross?

Mr. Callaghan: None.

The Court: Mr. Walsh?

Recross Examination

By Mr. Walsh:

Q. You told him as a preface to all of those ques-

846 tions that the film was stolen, didn't you?

A. No, I did not.

Q. Didn't you characterize it as stolen film in your questions?

A. No, I did not.

Q. As a matter of fact, Mr. Brodtkin was trying to see him, wasn't he?

A. Not to my knowledge. He never called me.

Q. Mr. Brodtkin appeared as soon as you appeared at the Commissioner's office?

A. I wouldn't know. I didn't go to the Commissioner's office.

Q. But Mr. Brodtkin appeared that same day at the arraignment before Commissioner Walker?

Mr. Downing: I object to that.

By the Witness:

A. He may have.

The Court: The record will probably show it.

Mr. Walsh: The Commissioner's record does show it.

The Court: Very well.

Mr. Walsh: That is all.

Mr. Downing: That is all.

The Court: That is all. You may step down.

847 Objections, if any, to Government Exhibits 95 through 98?

Mr. Callaghan: I object specifically to Government Exhibits 95, 96 and 98 on the ground that proof here in this case is the only photograph shown to the defendant Gordon is the photograph identified as Government Exhibit 97. I have no objection to it.

The Court: Very well.

Mr. Walsh?

Mr. Walsh: Well, I will object on the ground there is no showing as to which of these photographs was shown to Mr. MacLeod. Other than that, I don't have any objection.

Mr. Downing: Your Honor, the record shows he stated he had shown all of them.

The Court: The objection is overruled, and Government Exhibits 95, 96, 97 and 98 are received in evidence.

(Said photographs, so offered and received in evidence, were marked, respectively, Government Exhibits 95, 96, 97 and 98.)

The Court: Any further rebuttal?

Mr. Walsh: I would like the jury instructed that
848 these photographs are not to be considered as the
photographs identified by other agents as one that they
showed.

The Court: The jury will recall the testimony, I assume.

849 The Court: Further rebuttal?

FRANCIS J. STEFANAK, called as a witness on behalf of the Government in rebuttal, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Downing:

Q. State your name, please?

A. Francis J. Stefanak.

Q. What is your business or occupation, Mr. Stefanak?

A. I am a Special Agent with the Federal Bureau of Investigation.

Q. How long have you been so engaged?

A. Four years.

Q. In July of 1950, through November, 1950, at what office were you stationed?

A. The Chicago office.

Q. Now, I show you Government's exhibits 95, 96, 97, and 98, in evidence. I will ask you to look at those and ask you if you have seen those before?

A. I have. There are photographs of James Marshall.

Mr. Callaghan: I object to that.

The Court: Sustained as to what they are.

By Mr. Downing:

Q. Approximately when did you first see those photographs?

A. I think it was in August of last year.

Q. By that you mean August of 1950?

A. Yes.

Q. Directing your attention to the defendant, Kenneth Gordon, are you acquainted with Kenneth Gordon?

A. Yes, sir.

Q. Do you see him in the court room?

A. Yes.

Q. Will you point him out, please?

A. Yes.

Transcript of Proceedings

Mr. Downing: Let the record show the witness has identified the defendant Kenneth Gordon.

By Mr. Downing:

Q. On what date did you have occasion to talk to the defendant, Gordon?

A. On November 8, 1950.

Q. Where did you talk to him at that time?

A. In the Chicago office, Room 2000 Bankers Bldg.

Q. Is that here in Chicago, Illinois?

A. That is here in Chicago, Illinois.

Q. Who else was present on that day?

A. Special Agent William McCormick.

851 Q. Was the defendant Gordon present too?

A. Yes.

Q. At that time and place did you show the defendant Gordon photographs, Government's exhibits 95 through 98, inclusive?

A. I did.

Mr. Callaghan: Your Honor please, I submit this is part of the Government's main case. If this man is going to testify to this, your Honor, he should have been required to do it. It is not proper rebuttal.

The Court: Is this corroboration?

Mr. Downing: Mr. McCormick testified about showing them to MacLeod. This man is testifying about his showing them to Gordon.

The Court: What is the testimony of the defense as to Gordon?

Mr. Downing: Gordon said he only saw 97. He thinks it was 97, although he thinks it was a larger photograph. He said 95, 6 and 8 were not shown to him.

The Court: Yes. Objection overruled. You may proceed.

By Mr. Downing:

Q. With respect to each of those exhibits, 95, 96,
852 97, and 98, were they illustrated and shown to the defendant, Kenneth Gordon, on November 8, 1950?

A. Yes. I showed him these photographs on November 8th.

Q. Did you have a conversation with him at that time?

A. Yes.

Q. Will you relate that conversation?

A. He examined the photographs and said he did not

know this individual. Had never seen him before, and I said, "This is James Marshall from Detroit, Michigan. He is a friend of Al Swartz, the jeweler in Detroit, Michigan."

And Kenneth Gordon said, "I know Al Swartz. He is a jeweler in Detroit."

He said, "I have done some jewelry business with Al Swartz. I don't know this fellow at all. Never heard the name Marshall."

Q. ~~Is that~~ the extent of your conversation about the photographs, Government's exhibits 95, 96, 97, and 98, on that date?

A. Yes, sir.

Mr. Downing: You may cross examine.

Mr. Callaghan: No cross examination.

853 The Court: Do you have any questions?

Mr. Walsh: Yes.

Cross Examination

By Mr. Walsh:

Q. Have you been in the court room during the taking of evidence?

A. No, sir.

Mr. Walsh: That is all.

Mr. Downing: That is all.

The Court: Step down.

(Witness excused)

860 (The following proceedings were had in the presence and hearing of the jury:)

The Court: The Government may proceed with rebuttal.

JAMES IRVIN MARSHALL, called as a witness in rebuttal on behalf of the Government, having been heretofore previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Downing:

Q. Will you state your name, please?

A. James I. Marshall.

861 Q. You are the same James I. Marshall who has been previously sworn and testified in this matter, is that right, sir?

A. That is right.

Q. Mr. Marshall, what was the first date that you met the defendant Gordon?

Mr. Callaghan: That is objected to, as not proper rebuttal.

Mr. Downing: It is a preliminary question, your Honor.

The Court: He testified to that on the Government's case in chief. Sustained.

By Mr. Downing:

Q. Directing your attention to July 20, 1950, were you at the Liberal Jeweler's at 21 East Adams?

Mr. Callaghan: Same objection.

The Court: Overruled. That was gone into, July 20, '50.

Mr. Downing: July 20th.

Mr. Callaghan: All of that has been testified to on the Government's main case, your Honor please.

The Court: Yes. So far as there was a variance in 862 the defense.

Mr. Callaghan: It is not proper rebuttal. It is not something that the defendants have brought as new evidence or additional evidence on the defense of this case.

The Court: Objection overruled.

Mr. Walsh: On behalf of the defendant MacLeod, I suggest that the direct testimony did not relate to Mr. MacLeod, and that the rebuttal has no bearing on him.

The Court: That is as to the 20th. That is right.

Mr. Downing: That is as to the jewelry store.

The Court: That is as to the jewelry store, and the instruction that you asked for at that time, as I mentioned, will be given. If the defendant MacLeod was not present, of course the evidence does not apply to him.

Proceed.

By Mr. Downing:

Q. On the first date that you met the defendant Gordon, were you in the back office, in any back office in that store with the defendant and Mr. Swartz for approximately 863 20 minutes?

A. No, sir.

Q. Have you ever been at any time in the back, in a back office at the business establishment of the defendant, Kenneth Gordon, with Mr. Swartz and the defendant Gordon for any amount of time of 20 minutes?

A. No.

Mr. Callaghan: The same objection.

The Court: The same ruling. The answer may stand. By Mr. Downing:

Q. Were you ever in the back office of Gordon's business establishment with Mr. Swartz when the defendant, Gordon, was in the back room sorting diamonds?

A. No, sir.

Mr. Callaghan: Your Honor, please, so that I need not be continually interrupting and in order not to prolong this trial unduly, may it be understood I object to each of the questions which will be asked along that same line?

The Court: Yes.

Mr. Callaghan: Without the necessity of my repeating the objection on each occasion?

864 The Court: Yes. I think that will promote the orderly handling of the case. Your objection in that regard may be noted.

Mr. Walsh: So far as the defendant MacLeod is concerned, we want to preserve our rights insofar as all this testimony is concerned on this day. MacLeod is not present, according to his testimony.

The Court: I have ruled on that already. I said I would give an instruction.

865 Q. Now, on the date that you first met the defendant Gordon in his jewelry store in Chicago, did Mr. Swartz ask Gordon about a diamond wrist watch, and did Mr. Swartz tell Mr. Gordon it was sort of high priced for him, and he was tied up in a film deal and would have the films sold by next week, and maybe he would be interested by then? Did that conversation ever take place in your presence?

A. Not that I know of.

Q. Did Mr. Swartz ask Mr. Gordon on the first date that you met Mr. Gordon in a back office in the jewelry store, in your presence, did Mr. Swartz ask Mr. Gordon, "Incidentally, do you know of a garage where I can put the film"?

A. No.

Q. Did Mr. Swartz tell Mr. Gordon on the first date that you met the defendant Gordon, did Mr. Swartz make this statement to Gordon: "I have a truck load full of film"?

A. No, not in my presence.

Q. Did Mr. Gordon tell Mr. Swartz at any time in your

presence to look in the newspaper and see if he could find a garage advertised in the Chicago Tribune?

A. No.

866 Q. In your presence at any time did Mr. Gordon tell Mr. Swartz that he had a garage behind his rooming house at 215 East Erie Street, and ask you what size truck you had?

A. No.

Q. Did you ever at any time describe to the defendant Gordon an old newspaper truck in which you had film?

A. No.

Q. And did you ever describe to the defendant Gordon any type of a truck at any time?

A. No.

Q. In your presence did the defendant Gordon ever call the defendant MacLeod and ask him the condition of the garage in the rear of the premises, and describe the truck which you are alleged to have told him about?

A. No.

Mr. Callaghan: If Your Honor please, I want to again make a more specific objection. This is not a proper way of presenting rebuttal evidence. He is asking each question and answer in connection with the whole lawsuit, re-trying the whole case.

The Court: How far are you going?

Mr. Downing: Just a small amount. I think it will take about ten minutes.

867 The Court: I don't want you to go over every bit of the witness' testimony.

Mr. Downing: Oh no.

The Court: Can't you put it together, combine some of it, if you can?

Mr. Callaghan: Is my objection overruled?

The Court: Yes. Let the record note the objection is overruled.

By Mr. Downing:

Q. Did Mr. Gordon ever tell Mr. Swartz in your presence that he had space in the garage and that he would charge him \$20 for the garage?

A. No, sir.

Q. Did Mr. Swartz ever tell Mr. Gordon in your presence that he would pay \$20?

Mr. Callaghan: I object to that last question as not being proper impeachment.

The Court: Read the question.

(Question read.)

The Court: Overruled.

By Mr. Downing:

Q. The second time on which you came to Chicago, at which you went into the store on July 27th, you went 868 in with the defendant Gordon—

Mr. Callaghan: Wait a minute. I object to him stating that this witness did certain things, stating that that is the fact.

The Court: Sustained. It may be stricken.

By Mr. Downing:

Q. Directing your attention to July 27, 1950, were you in the Jewelry store with the defendant Gordon on that date?

A. Yes, sir.

Q. Did you have occasion that day to go into the back room with the defendant Gordon and Mr. Swartz?

A. No, sir.

Q. At that time in your presence did Mr. Swartz tell Gordon that he wanted to take the truck and told him that he didn't get the key the first time he put the truck into the garage, the week before?

A. No, sir.

Q. Now, directing your attention to July 27, at 215 East Erie Street, on that day did you see the defendant MacLeod at that location?

A. Yes, sir.

Mr. Walsh: What date is that?

Mr. Downing: July 27th.

869 By the Witness:

A. Yes, I did.

Mr. Callaghan: There is no dispute about that. That is not proper rebuttal.

The Court: Overruled.

By Mr. Downing:

Q. Did you at any time say to the defendant MacLeod at 215 East Erie Street, "Why don't you drive the truck out, and I will back the car in"?

Mr. Walsh: Oh, now, I object to this, Your Honor. This was a conversation testified to as being one that was in effect.

The Court: In what?

Mr. Walsh: As being a conversation that was described as in effect.

The Court: You mean "substantially"?

Mr. Walsh: Described to Your Honor as being substantially.

The Court: Yes.

Mr. Walsh: And that is not the question the prosecutor has asked.

The Court: He is entitled to paraphrase it, "substantially, or."

Mr. Walsh: It is a circumstantial situation, and I think the prosecutor should be required to ask whether that question was asked in substance, in effect, or nearly.

The Court: Well, in so far as your objection goes to the phrasing of the question, it is sustained.

You must state "in substance" or "in effect."

Mr. Downing: The remainder of the objection is overruled.

By Mr. Downing:

Q. In substance or effect, did the defendant MacLeod at 215 East Erie Street say to you, in substance or effect, "Why don't you drive the truck out, and I will back the car in"?

Mr. Walsh: I object to that as not being proper impeachment, and nothing has been testified to by any witness here—

The Court: Overruled.

Mr. Walsh: The defendant MacLeod did not testify that he stated that to this man, and that is the question.

The Court: The objection is overruled. He may answer.

By Mr. Downing:

Q. What is your answer?

A. Mr. MacLeod said he was going to drive the car out, and for me to drive my car—

Mr. Callaghan: I object to that. The question is, "Did you say." I object to the answer of the witness.

The Court: Yes, the answer may be stricken.

Answer that yes or no. Did he or did he not say that in substance?

The Witness: For me to drive the truck?

Mr. Downing: Yes. Did Mr. MacLeod say to you,

"Why don't you drive the truck out, and I will back the car in"?

Mr. Walsh: I object to that as not being proper evidence in the case, proper redirect.

The Court: You will have to talk one at a time. Now, you, Mr. Walsh.

Mr. Walsh: We were talking about my client, so I think I should talk.

The Court: I am listening to you.

Mr. Walsh: I say to Your Honor this: That that question, there is no evidence that such a statement was ever made by Mr. MacLeod in this record, and that the prosecutor is misquoting the evidence. I will leave that to you and the jury.

Mr. Callaghan: Will Your Honor examine that page of the record? It can only be admissible as impeachment, if it is important at all.

Mr. Downing: Commencing with line 11, Your Honor.

Mr. Walsh: I object to consulting the record, unless the jury is to look at it.

Mr. Downing: If Your Honor please, defendant's counsel suggested that.

The Court: That objection is overruled.

Ask him whether or not MacLeod said this. If you take that quote out of line 11, the objection is sustained.

By Mr. Downing:

Q. Did you say to Mr. MacLeod at any time—

The Court: "In substance."

By Mr. Downing:

Q. (Continuing)—in substance or effect, "Why don't you drive the truck out and I will back the car in"?

Mr. Walsh: I object to this as leading and suggestive, and in view of the whole record that has transpired.

The Court: Overruled.

By Mr. Downing:

Q. Did you in substance or effect say to the defendant MacLeod at 215 East Erie Street, "Why don't you drive the truck out and I will back the car in"?

A. I didn't say that. Mr. MacLeod said that.

Q. What is your recollection as to what Mr. MacLeod said about that matter?

A. Mr. MacLeod said for me to drive my car in.

Mr. Callaghan: I object to asking that question. It is part of the government's main case, and not proper rebuttal.

The Court: Overruled.

By Mr. Downing:

Q. What did Mr. MacLeod say to you at that time?

A. He told me to drive my car inside the garage.

Q. Now, at 215 East Erie Street, did Mr. Swartz say in your presence to the defendant MacLeod that if it was all right to take the key that was still hanging in the lock on the garage door?

A. No, sir.

Mr. Walsh: Well, I object to that as not having 874 been the testimony of Mr. MacLeod, and not proper impeachment.

The Court: Overruled.

Mr. Walsh: The defendant MacLeod did not testify that he made such a statement in the presence of Mr. Marshall.

The Court: Proceed. I have ruled on it. I have overruled the objection.

By Mr. Downing:

Q. Directing your attention to Government Exhibit 83 in evidence, did you on July 27 show the note that is contained therein to the defendant MacLeod?

A. Yes, sir.

Q. Where were you at that time?

A. I rang the bell at 215 East Erie.

Mr. Walsh: I didn't hear the answer.

The Witness: I rang the bell at 215 East Erie.

Mr. Downing: Would you repeat the previous question?

The Court: Ask another question.

By Mr. Downing:

Q. Was the defendant MacLeod present at that time?

Mr. Walsh: I object to that and I ask now that I 875 be told where he was which was the question.

By The Witness:

A. 215 East Erie.

The Court: The objection is overruled. He may answer the question.

Mr. Walsh: Your Honor, the point here is this: He has now asked him whether he showed him a card at a point. "Where were you?" was his question, and you

showed him this card, and we all heard the testimony that both of these men—they agree they were at 215 East Erie. At what point at 215 East Erie were we; that is my inquiry.

The Court: Will you proceed with the examination? I overruled it.

Mr. Walsh: I object to the question and answer.

By Mr. Downing:

Q. At the time you were shown the defendant MacLeod at 215 East Erie, whereabouts were you?

A. I was on the inside of the lobby. I rang the bell.

Q. Was that in front or back of the building?

876 A. In the front of the building.

Q. Directing your attention to July 27th, at 215 East Erie Street, did you ask the defendant MacLeod if you could take the key that was still in the lock?

Mr. Walsh: I object to this. No one has testified to that. It is not impeachment.

Mr. Callaghan: May I respectfully submit this, if Your Honor please?

The Court: Wait until he finishes.

Mr. Walsh: This is an effort to show that somebody is lying, and it is not based on the record.

Mr. Callaghan: Counsel is now reading and asking questions from matters he developed on cross examination, and I submit, if Your Honor please, that it is not proper rebuttal.

The Court: You asked him whether or not he asked MacLeod if he could leave the key?

Mr. Downing: No, if he could take the key that was still in the lock.

The Witness: What key?

Mr. Callaghan: It is not in rebuttal of any evidence presented by the government.

The Court: The objection is sustained.

877 By Mr. Downing:

Q. Did you ever obtain any key at 215 East Erie Street?

Mr. Walsh: I object to that as not proper rebuttal, on the same basis.

The Court: Overruled. He may answer.

By The Witness:

A. No, sir.

Mr. Walsh: Your Honor, it was not stated by any witness on the defense that this man obtained the key.

The Court: The answer may stand.

Mr. Walsh: At 215 East Erie.

By Mr. Downing:

Q. Now, at the time you were at 215 East Erie Street in Chicago, did you see any figurines in the garage?

A. Yes, sir.

Mr. Walsh: Well, I object to that. That was not denied on either direct or cross examination.

The Court: The objection is sustained, and the answer may be stricken.

Mr. Walsh: I move to strike the question and answer.

The Court: I have already done it. Sit down.

Ask your next question.

878 By Mr. Downing:

Q. Now, directing your attention to July 22, 1950, were you present at a conversation with the defendant Gordon?

A. Yes, sir.

Q. Where was that conversation?

A. It was two places.

Q. Where did you first have a conversation on the 22nd of July?

Mr. Callaghan: I object. I submit, if Your Honor please, that this is not proper rebuttal, that there is no evidence offered by the defendant Gordon as to any conversations on July 22d of 1950. The evidence so far as the defendant Gordon is concerned was that on July 22, 1950 he wasn't even present. He is asking now for a conversation.

The Court: And on that ground, I overrule your objection.

By Mr. Downing:

Q. Where did you first have a conversation with the defendant Gordon on that date?

A. On Division, near Lake Shore Drive, or Michigan—I am not sure which.

879 Q. That was here in Chicago?

A. Here in Chicago?

Q. And who else was present?

A. Mr. Swartz and myself.

Q. Now, will you relate the conversation in substance, as best you can recall?

Mr. Callaghan: That is objected to as not being proper rebuttal, there having been no conversations in evidence.

The Court: Sustained. That was related in the Government's case in chief.

Mr. Downing: Not this part of it; this phase was not.

The Court: On the 22d at Lake Shore Drive?

Mr. Walsh: If he intends to rely upon it, I submit it should have been part of the case in chief.

Mr. Downing: There was no conversation on the 22d. He testified he met him there, that's right, but it is my recollection that there was no conversation testified about.

Mr. Callaghan: By either side, and I submit therefore it is not proper rebuttal.

The Court: Well, there was no conversation testified to, according to my notes on the case in chief.

The objection is overruled. He may answer.

By Mr. Downing:

Q. Will you relate the conversation?

The Court: First, set the time, other than the date.

By Mr. Downing:

Q. Approximately what time was this conversation, the first conversation?

A. About 4:30, 4:20 or 4 o'clock.

Q. That was in the afternoon, was it?

Mr. Walsh: If it please Your Honor, this objection made by Mr. Callaghan will not apply to both defendants, and I make it again on behalf of MacLeod. Apparently it is not in his presence.

The Court: Very well. MacLeod isn't there, so it doesn't apply against MacLeod.

Mr. Callaghan: Nor does it apply even against the defendant Gordon, as I understand your previous ruling. There is no charge in the indictment that any offense occurred on July 22d.

881 The Court: I will instruct the jury at the right time on that.

By Mr. Downing:

Q. That was between 4 and 4:30?

A. Yes.

Q. That was in the afternoon, was it?

A. Yes.

Q. Now, will you relate the conversation as best you can recall?

A. Mr. Swartz said something to Gordon about how come he couldn't get in touch with him, we had gotten in Chicago around 12 or 12:30, and he hadn't been able to contact him.

The Court: - I cannot hear you.

By The Witness:

A. (Continuing) Mr. Swartz had not been able to contact Mr. Gordon.

Mr. Callaghan: I move that be stricken.

The Court: What did he say?

By Mr. Downing:

Q. What did Mr. Swartz say, what did he tell Mr. Gordon?

A. Mr. Swartz said we had been here, and had been calling and called his house around three or four times.

882 Mr. Walsh: I object to that.

The Court: Overruled.

By Mr. Downing:

Q. This is what Swartz told Gordon?

A. That's right.

Q. What else was said at that time?

A. Gordon said he had been out on his boat, sailing or fishing or something.

Q. Was there any other part of the conversation that you can recall at that time?

A. And Gordon told us to drive down the alley, and we followed Mr. Gordon's car.

Q. All right. Now, did you ever at any time bring a truck load of film from Detroit to Chicago?

A. No, sir.

Mr. Walsh: I object to that.

The Court: Overruled.

Mr. Walsh: It is not suggested by the evidence.

By Mr. Downing:

Q. To your knowledge did Mr. Swartz ever bring a truck load of film from Detroit to Chicago?

Mr. Walsh: I object to that as not being any part of the evidence, or any proper impeachment, or proper rebuttal.

Mr. Callaghan: I submit that that calls for a conclusion.

The Court: Both objections are overruled.

By The Witness:

A. No, sir.

By Mr. Downing:

Q. Did you ever have a truck load of film in your care, control, custody or possession here in Chicago?

884 Mr. Callaghan: That is objected to as calling for a conclusion of the witness. That is one of the ultimate questions of fact to be determined by this jury.

The Court: Overruled. He may answer.

By The Witness:

A. At no time.

By Mr. Downing:

Q. At any place, did you ever have a truck load of film under your care, control, custody and possession?

Mr. Callaghan: That is objected to as not being proper rebuttal.

Mr. Walsh: That is objected to. It invades the province of the jury.

The Court: Overruled. He may answer.

By The Witness:

A. No, sir.

By Mr. Downing:

Q. To your knowledge, did the defendant Swartz ever have a truck load of film in his control, custody, and possession in Chicago?

885 Mr. Walsh: Obviously this question asks this witness to decide the whole case.

The Court: Yes, sustained.

By Mr. Downing:

Q. Is the only film that you have had in your possession in Chicago, the film about which you have testified previously?

Mr. Walsh: That is objected to.

Mr. Callaghan: That is objected to as not being proper rebuttal and calling for a conclusion.

The Court: Overruled. He may answer.

By The Witness:

A. Will you repeat the question?

By Mr. Downing:

Q. Is the only film you had in your possession here in Chicago the film about which you testified you had on July 20, 22, and 27?

A. No, sir.

Mr. Walsh: I object to that.

The Witness: I carry film in my store.

Mr. Walsh: May I have a ruling on that objection, your Honor?

By Mr. Downing:

Q. Here in Chicago, have you had any other film 886 other than the one you testified about?

A. No, sir.

Mr. Downing: You may cross examine.

Cross Examination

By Mr. Callaghan:

Q. Did someone tell you that Mr. Gordon had testified here that on July 22, he had been out on his boat all day?

A. No, sir.

Q. Did you discuss your evidence with anybody this morning before you took the witness stand?

A. Yes, sir.

Q. With whom?

A. With Mr. Downing.

Q. And who else?

A. Mr. McCormick?

Q. And who else?

A. I think it might have been Mr. Reddy.

Q. Who?

A. Mr. Reddy.

Q. Anybody else?

A. I didn't discuss it with Mr. Reddy, but Reddy was present.

887 Q. Anybody else?

A. That is the only one I remember.

Q. Did Mr. Gordon say he was sailing?

A. He said he had been out on his boat. I don't know whether he was sailing or fishing.

Q. Well, which did he say, sailing or fishing?

A. He said out on his boat.

Q. Did he mention sailing or fishing?

A. No, sir.

Q. You thought about that when you said "out on his boat, sailing or fishing", is that right?

A. Yes, sir.

Q. Gordon didn't say anything like that, did he?

A. He said he had been out on his boat.

Q. And that is all?

A. That's right.

Q. How long had you spent with Downing this morning?

A. 10 or 15 minutes.

Q. Had your case been disposed of in Detroit since you left here?

A. No, sir.

Q. Have you been back to Detroit since you first testified?

888 Mr. Downing: Objection. That is immaterial:

The Witness: For two hours.

The Court: Sustained.

The answer may be stricken. That last answer may be stricken.

By Mr. Callaghan:

Q. Have you consulted with the United States Attorney in Detroit since you left here?

Mr. Downing: Objection, your Honor.

The Witness: No.

The Court: Overruled. He may answer:

889 Q. Did you consult with the agents of the Federal Bureau of Investigation since you last testified?

A. One of them, I talked with one of them.

Q. Mr.—

A. Mr. Phillips.

Q. Mr. Phillips from Detroit?

A. Yes, sir.

Q. Where did you talk to him?

A. In the U. S. Marshal's office in Detroit.

Q. In Detroit, Michigan?

A. Yes.

Q. That is since you have testified in this case?

A. Yes.

Q. Who else was present when you talked to Mr. Phillips in the Federal Bureau of Investigation?

A. Some marshals.

Q. United States Marshal?

A. Yes, sir.

Q. Who else?

A. That is all.

Mr. Callaghan: That is all.

The Court: Mr. Walsh?

Mr. Walsh: One question.

Cross Examination

By Mr. Walsh:

Q. You are a convicted felon, are you not?

Mr. Downing: I object, your Honor. It is not proper rebuttal.

The Court: Sustained.

By The Witness:

A. No, sir.

Mr. Walsh: I suggest this is an examination of his character.

The Court: I have sustained the objection, Mr. Walsh.

By Mr. Walsh:

Q. You have plead guilty to a felony?

Mr. Downing: Your Honor, I object. That is not proper cross examination.

Mr. Walsh: This goes to his character. He is a rebuttal witness.

Mr. Downing: It was not gone into on direct examination.

The Court: He may answer.

By The Witness:

A. What?

By Mr. Walsh:

Q. You have pleaded guilty to a felony under the 891 laws of the United States, have you not?

A. Yes, sir.

Q. You are unsentenced for the felony, is that right?

A. That is right.

Mr. Walsh: That is all.

The Court: Mr. Downing, any other questions on redirect?

Redirect Examination

By Mr. Downing:

Q. In connection with the question Mr. Callaghan asked you about discussing your testimony, will you explain the discussion that you and I had about any testimony this morning?

Mr. Callaghan: I object to discussing on explanation.

Mr. Walsh: I object to explanations—

The Court: Overruled.

Mr. Walsh: Either his conclusion or as far as his explanation is concerned, I suggest it is a matter of argument in support of the objection.

The Court: The objection is overruled.

892 By Mr. Downing:

Q. Will you explain that?

A. Mr. Downing, you asked me whether these questions were true.

Mr. Walsh: I object to that, your Honor. I move the answer be stricken.

The Court: The motion is denied.

Mr. Callaghan: I want to enter an objection.

By Mr. Downing:

Q. At the same time did you make—

Mr. Callaghan: I want to make an objection.

Mr. Downing: Pardon me.

Mr. Callaghan: I submit, if your Honor please, that he was only asked whether or not he had a discussion. I further respectfully submit he is not entitled to go into that discussion and that these defendants are not bound by conversations had between the United States attorney and this witness out of their presence; and he be not permitted to go into detail on those discussions to say what was said and by whom at those discussions.

The Court: I will not permit him to go into the detail of it but in a general way he can tell us what was said.

By Mr. Downing:

Q. In general, did you give the same answers this morning to me that you have given here in the Court?

A. The same.

Mr. Walsh: I object to this.

The Court: Overruled.

Mr. Walsh: It is obviously calling for his conclusion.

The Court: Overruled.

Mr. Downing: That is all.

The Court: Any recross?

Mr. Callaghan: None.

The Court: Mr. Walsh?

Mr. Walsh: No more.

The Court: That is all. You may step down.

(Witness excused)

The Court: Call your next witness.

Mr. Downing: The Government rests.

The Court: The Government rests.

(The Government rested its case).

The Court: The jury will step out for a few moments.

Mr. Callaghan: The record ought to show that we
894 rest before they step out.

The Court: You did before.

(Thereupon the jury was excused and the following additional proceedings were had in the court room out of the presence and hearing of the jury:)

The Court: Motions?

Mr. Callaghan: Yes, your Honor. The defendants now at the conclusion of all of the evidence renew the motion that was heretofore made at the conclusion of this case for the United States, that the court enter a judgment of acquittal.

That motion is made as to each count of the indictment separately and severally. We urge in support of those motions the same grounds that we urged at the conclusion of the evidence for the United States and the additional ground, of course the evidence now having been heard and presented by the defense, that there is no sufficient evidence upon which this case may be presented to the jury.

The Court: It will be unnecessary to argue it. You
895 join in the same motion?

Mr. Walsh: On behalf of MacLeod I join in the motion.

The Court: The motion on behalf of both defendants is taken under advisement pursuant to the rules of Criminal Procedure, until after the return of the jury. If the jury's verdict is unsatisfactory to the defendants, you may join your argument in a motion for a new trial, together with your argument in support of this motion at a time to be set.

Pursuant to the rules of Criminal Procedure counsel will now be advised as to the court's ruling on the proffered instructions.

As to all instructions offered both by the Government and by the defendants; Gordon and MacLeod, and when I indicate that an instruction will be given in substance, I mean the principle of the instruction will be given. It may be given in a slightly different language than is contained in the proffered instruction. Likewise, when I indicate that the instructions will be given I intend to eliminate as much as possible of the repetition that occurs in some
896 or both the Government and the defendant Gordon's instructions. There are two or three instructions on

the same subject. I may use a part of each and give one instruction on the subject. If you will bear those two things in mind I will rule on the instructions as proffered.

Government's instructions 1 through 11 will be given in substance.

The defendant Gordon's instructions 1 through 18 will all be given in substance, with the exception of No. 14, which starts—I do not know if you can find it.

Mr. Downing: I cannot find the numbers.

The Court: They are not numbered. Well, count to the 14th sheet of paper.

Mr. Downing: All right.

The Court: It starts with "You are hereby instructed that if you find from the evidence that any witness for the prosecution has been promised immunity or reward and has received immunity—" That instruction is refused.

The two preceding instructions 12 to 13, will be given in substance. And go to the question of careful scrutiny 897 of the testimony of the person whose testimony incriminates himself as well as others, this will be given in substance and 14, which refers specifically to a promise of immunity or reward or receipt of immunity and will be refused.

Mr. Walsh: May I say, your Honor—

The Court: Your chance to object will be after the charges given and before the jury retires. The rule now requires me to instruct you how I am going to rule on your proffered instructions.

Now, on 18, submitted by Gordon, the first part of 18 will be given. I am not going to refer to the term wholesale, rather than retail value and to that extent the proffered instruction 18 is refused. I think the best instruction on value is a combination of the one offered by the defendant, MacLeod, and the one offered by the Government, which embraces also what is suggested in this offered by Gordon and such an instruction will be given, including the language of the statute on market value and the reference to what is market value contained in one of the Government's instructions. So that Gordon's instruction 18 so far as it refers to wholesale rather than retail will be refused. As to the rest of it, it will be given substance.

All of the instructions proffered by the defendant MacLeod, 1 to 6, will be given in substance.

Now, there were 2 hours per side allowed for argument. Are you ready to proceed? We will take a short recess.

Mr. Walsh: Mr. Callaghan has just called my attention to the fact that I have neglected to present to your Honor an instruction which I prepared last night.

The Court: I asked you when you came in this morning.

Mr. Walsh: I am sorry about it.

899 The Court: Have you it here?

Mr. Walsh: I do not have it here. It is to this effect and I think it is important, that the jury should not consider against any person the fact that he has refused to answer questions while in custody.

Mr. Callaghan: That is an approved instruction.

The Court: I cannot properly rule on it until you submit something in a specific language. If you get something in here this afternoon before the case goes to the jury, during the recess, I will tell you how I will rule on the instruction.

Mr. Walsh: Thank you.

The Court: In that general language I couldn't tell you, but I will rule on it if you will write it out and bring it in. I will give you a ruling. Since you did not bring it in, I will hear you at 2 o'clock.

937 Before Judge Campbell and a Jury,

Wednesday, June 6, 1951,

2:00 o'clock, p.m.

Court met pursuant to recess.

Present:

Honorable Otto Kerner, Jr.,

U. S. District Attorney,

By: Robert J. Downing,

On behalf of Government;

Assistant S. U. Attorney,

Mr. George F. Callaghan,

On behalf of Defendant Gordon;

Mr. Maurice J. Walsh,

On behalf of Defendant MacLeod.

938 (The following proceedings were had in the court room out of the hearing and presence of the jury:)

The Court: I assume you are referring to this last instruction you have just handed up?

Mr. Walsh: That is right, your Honor.

The Court: On behalf of the defendant—

Mr. Walsh: MacLeod.

The Court: The instruction will be given in substance.

Mr. Callaghan: If your Honor please, it is not our fault the jury came in. We asked that they be held. I guess it was not understood.

Just prior to the beginning of this trial and since 939 this trial has begun the defendants have on successive occasions moved for a mistrial because of various articles and things that appeared in newspapers, and an article appeared this morning and another one just the other day. Other articles have appeared since this motion for the mistrial was made. I would like now to renew that motion for a mistrial because of that. According to what your Honor has said previously, your Honor indicated you would grant leave to file these documents at some later date. I thought we ought to do it before the arguments were concluded. I would like to file it with the Clerk.

The Court: Surely, you may file the same.

Mr. Walsh: I have in addition to that a transcript from the Station W-I-N-D, which is not under oath or anything other than I stated to the Court I heard it. It is on that station.

The Court: You heard it yourself.

Mr. Walsh: Yes.

The Court: Does that represent what you heard?

Mr. Walsh: Yes.

The Court: Leave to file, in support of the mo- 940 tions heretofore made which have been denied.

Are we ready for the jury now?

Mr. Walsh: Yes, sir.

The Court: Bring in the jury.

(The following proceedings were had in the court room in the presence and hearing of the jury:)

The Court: You will follow Mr. Walsh then?

Mr. Callaghan: Yes, your Honor.

1023 The Clerk: 50 CR 641, United States vs. Kenneth C. Gordon and Kenneth J. MacLeod, case on trial.

The Court: Bring in the jury.

(Proceedings resumed in the presence and hearing of the jury)

The Court: It now becomes the duty of the Court to

instruct you in the law in the case wherein you have finished hearing the evidence and the arguments of counsel.

You will recall that at the very outset of this trial, I admonished all of you as to the nature of your oath, and against discussing the case with anyone or among yourselves and also against arriving at any conclusion on the case until you had heard all of the evidence on both sides, the arguments of counsel, instructions of the Court, and it is that part of the case that we are now coming to, the instructions of the Court.

I also admonished you at that time that you were not to be influenced in any way by anything that you might have read or might read in the newspapers or hear on the radio, or have communicated to you by way of television or any other means of communication; that you should be guided entirely in arriving at your decision in this case on the evidence as you heard it from the witness stand and the exhibits that are received in evidence, and on the law as I give it to you in these instructions:

I know you have all followed my admonition in this regard, and that you have heard the evidence with an open mind and that you have not carried on any of these discussions and, therefore, we will proceed at this time to instruct you as to the law, following which you will commence your deliberations to arrive at your verdict.

Now, these instructions on the law are intended to be a connected and consistent whole body of instructions. No one instruction can be taken away from other instructions and considered by itself unless it is of that character which requires it to be so considered. These instructions are a connected and continuous whole and they must be considered each in connection with the others, and not picked apart or considered piecemeal or by sentences, phrases, or paragraphs.

This case is one brought by an indictment returned 1025 by the Grand Jury of this District on December 1, 1950, in which the Grand Jury in four Counts charges Kenneth C. Gordon, who is seated at counsel table, Kenneth J. MacLeod, who is also seated at counsel table, and Albert Swartz, with certain offenses against the United States. As you have heard, the death of Albert Swartz has been suggested to the Court, and accordingly he has been dismissed from the indictment, so that as far as you

are concerned, the indictment charges at this time just Kenneth Gordon and Kenneth MacLeod.

The first Count of the indictment charges that on July 20, 1950, those defendants did unlawfully, wilfully and knowingly have in their possession, certain goods and chattels, to-wit: 11 cartons of 116 Kodak film; 7 cartons of 8 millimeter Kodachrome roll film; 1 carton of 8 millimeter Kodachrome magazine film; and 5 cartons of 16 millimeter Kodachrome movie film, which said goods had been theretofore unlawfully taken and carried away from a motor vehicle of the Interstate Motor Freight System, a Corporation, common carrier, on or about July 10, 1950, at Chicago, while those goods were moving as part of an interstate shipment of freight from Rochester, New York, to Chicago, Illinois, all of which goods were then in the 1026 control, custody and possession of the Interstate Motor Freight System, the common carrier.

The indictment further charges that the defendants at that time, that they had in their possession these goods in the Northern District of Illinois, which is our district here, then and there well knew that the same had been stolen. It charges a violation of Sec. 659 of Title 18 of the U. S. Code.

Get me the Code. It is the blue book over there. (indicating). The second Count of the indictment charges that the same defendants on or about July 20, did unlawfully, wilfully and knowingly transport and cause to be transported in interstate commerce from the City of Chicago in the State of Illinois to the City of Detroit in the State of Michigan, certain of the merchandise theretofore stolen—that is, the merchandise described in the first Count of the indictment which I have just summarized for you, which is incorporated by reference into Count 2 of the indictment—and which merchandise was of the value of more than \$5000, and the defendants then and there knowing the same to have been stolen, at the time that the merchandise was transported in interstate commerce as stated, in violation of Sec. 2314 of Title 18 of the U. S. Code.

1027 Count 3 of the indictment again charges a violation of Sec. 659 of Title 18, and charges that the same defendants on July 27—you will recall the first two counts refer to July 20, and the third and fourth counts refer to July 27. We are now concerned with the third.

It charges that on July 27, at Chicago, in this district, the defendants unlawfully, wilfully and knowingly had in their possession certain goods to-wit: 30 cartons of 8 millimeter Kodachrome roll film, which goods had been unlawfully stolen and taken and carried away from a certain motor vehicle of the Interstate Motor Freight System on July 10, 1950, at Chicago, while the goods were moving as part of an interstate shipment of freight from Rochester, New York, to Chicago, Illinois, in the possession of the Interstate Motor Freight System.

Count 4 charges the same defendants with having unlawfully transported in interstate commerce the merchandise described in Count 3, in that they are charged with having unlawfully, wilfully and knowingly transported and caused to be transported that merchandise described in Count 3, from the City of Chicago to the City of Detroit, one 1028 in Illinois and the other in Michigan, on July 27, 1950, and at that time that the merchandise was of the value of more than \$5000, and that the defendants at the time knew it had been stolen, in violation of Sec. 2314, of Title 18.

You will note that Counts 1 and 3 charge violation of Sec. 659 of the Code; Counts 2 and 4 charge a violation of Sec. 2314 of the Code, and I will now read those two sections, insofar as you are concerned with them.

Sec. 659 of Title 18, which is the Criminal Code of the United States, reads, insofar as you are concerned with it, as follows:

"Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any motor truck, or other vehicle, or from any station, station house, platform or depot with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or

1029 "Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen, shall be punished in accordance with the terms of the Statute."

Sec. 2314 of the same Code, insofar as you are concerned with it, reads as follows:

"Whoever transports in interstate or foreign commerce any goods, wares, merchandise, of the value of \$5000 or more, knowing the same to have been stolen, converted or taken by fraud, shall be punished in ac-

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cordance with the provisions of the Statute."

So much for the indictment and the two sections of the Statute which the indictment charges to have been violated by these two defendants.

I am permitting the jury to take with it to the jury room the indictment in this case. I do so, however, with the caution and admonition that the indictment is not to be considered by the jury as any evidence against either defendant. The indictment is simply the formal charge made by the Government and must be considered by the jury in that light, and in no other light. In other words, the indictment is being given you for the purpose of informing you more at length as to the precise charges made.

1030 Now, you will note as I observed earlier that Counts

1 and 3 are similar except for different dates, and Counts 2 and 4 are similar, except for different dates.

Now, before you can find either defendant guilty on Counts 1 and 3 of the indictment the Government must prove, from all of the evidence and beyond a reasonable doubt, all of these 4 things:

First, that the goods described in that Count were stolen as charged;

Second, that at the time they were stolen, they were moving as or were part of, or constituted an interstate shipment of freight;

Third, that the goods or some of them came into the possession of such defendants; and

Fourth, that at the time they came into the possession of such defendant, he knew that they were stolen goods.

If the Government proves all four of these propositions beyond a reasonable doubt as to either or both of the defendants on Counts 1 and 3, then such defendant or defendants can be found guilty by you on such count; otherwise, they should be found not guilty on such count.

1031 The word "possession" as used in the Statute, applicable to Counts 1 and 3, may mean actual, manual, or personal possession, or it may also mean constructive possession, that is, where the goods are shown to have been under the control of the person charged, although they were in the actual physical possession of another.

The essence of the crime charged in Counts 1 and 3 of the indictment, that is, the charge of possessing goods stolen from interstate shipment, is guilty knowledge on the

part of the accused that the goods were stolen. It is not a crime to possess stolen property. The crime consists in possessing it knowing it to have been stolen, and you cannot find either defendant guilty under Counts 1 and 3 of this indictment unless you believe beyond a reasonable doubt that such defendant knew the goods were stolen, but it is not necessary to warrant a conviction under either of these Counts that the defendant knew the goods were stolen from an interstate shipment. They must indeed have been stolen from an interstate shipment of freight, but it is sufficient guilty knowledge if he knows they actually were stolen.

Possession of property recently stolen, if unexplained, is a circumstance tending to show guilty knowledge 1032 on the part of the accused that the goods were stolen, yet if the jury believes from the evidence that such defendant came honestly into possession of the property, or that possession by the accused is unconnected with any suspicious circumstances of guilt, this would be a satisfactory account of his possession, and would remove every presumption of guilt growing out of it.

In determining whether or not a defendant in this case had knowledge that the goods were stolen, you should consider all of the circumstances attending the possession of the goods by the accused, if you find that they were possessed by the accused. Now, that relates to Counts 1 and 3 of the indictment.

Now, as to Counts 2 and 4, before you can find either defendant guilty under the charges contained in Counts 2 and 4 of the indictment, the Government must prove beyond a reasonable doubt each of the 4 following items:

First, that the defendants, or one of them, either of the defendants, a particular defendant, knowingly transported, actively participated in or aided in transporting in interstate commerce from the City of Chicago in Illinois, to the City of Detroit, in Michigan, the merchandise described in Counts 2 or 4; 1033

Second, that the merchandise so transported had theretofore been stolen;

Third, that the said merchandise at the time it was transported from Chicago, Illinois to Detroit, Michigan, was of a value of more than \$5000; and

Fourth, that the defendants at the time the said merchandise was transported knew that it was stolen merchandise.

If the Government successfully proves all four of those items with reference to either Counts 2 or 4 beyond a reasonable doubt against either or both defendants, then you can find such a defendant guilty on such count. If the Government fails to prove to your satisfaction beyond a reasonable doubt any of the aforementioned 4 items or facts, then you must find the defendants not guilty on the charges contained in Counts 2 and 4.

The law provides that whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is a principal; that whoever causes an act to be done by another which, if directly performed by him, would be an offense against the United States, is also a principal, the same as if he had committed the act before.

I refer to value in discussing Counts 2 and 4. The value of the property which must be determined by you under Counts 2 and 4 is the market value at the time of the alleged theft. The market value of goods is the price at which the owner of the goods or the producer holds them for sale; the price at which they are frequently offered in the market to all the world; such prices as dealers in the goods are willing to receive and purchasers are required to pay, when the goods are bought and sold in the ordinary course of trade.

In determining the value under Count 2 and Count 4 of the indictment, you must consider the language of the Statute, which reads as follows, in that regard:

“‘Value’ means the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, securities and 1035 money referred to in a single count shall constitute the value thereof.”

In other words, the value of the entire amount charged in a count is what determines the value in construing this Statute.

In determining the value referred to, you should consider the testimony of the witnesses who testified as to the value, their apparent knowledge of the value, and their ability to know the facts about which they testify. You should also consider their experience and familiarity with these matters, and then you determine the value of the merchandise described in those Counts.

Now, there are two defendants before you for trial. The guilt or innocence of the defendants is to be determined

separately, and as to each defendant, only that evidence which was admitted by the Court against the respective defendant is to be considered in determining his individual innocence or guilt.

Conversations of the defendants have been received in evidence. Conversations of either defendant out of the presence of the other defendant are to be considered only in regard to the guilt or innocence of the defendant engaging in such conversation, and are not to be considered by you in any manner with reference to the other defendant who was not present at such conversation.

The only charges pending against these defendants for determination by the jury are the charges in the indictment which I have just read to you, and the jury is not to consider any evidence concerning film not mentioned in the indictment, other than as a circumstance that may relate to the guilt or innocence of the defendants with regard to the charges in the Counts in the indictment.

Thus, testimony has been admitted in this trial as to an event on July 22, 1950. You will remember that the indictment charges in Counts 1 and 2 an event occurring or alleged to have occurred on July 20, and in Counts 3 and 4 an event alleged to have occurred on July 27. The indictment charges nothing as occurring on July 22nd.

Now, as to the testimony admitted with reference to that event occurring on July 22, insofar as the defendant MacLeod is concerned, you are to completely disregard that testimony, because it related only to the other defendant, Gordon. Neither are you to consider such evidence against the defendant Gordon as any proof of the substantive offenses charged in the indictment on July 20, and July 27. The indictment does not charge any offenses against either of these defendants as occurring on July 22, 1950. The testimony of the event on July 22nd was admitted solely on the question of intent on the part of the defendant, Gordon, and any testimony as to that occurrence, if you believe it did occur, is to be considered by you for that purpose and for no other purpose.

Now, the defendants in this, as in every other criminal trial, come to court presumed to be innocent, and that presumption protects them until such time as when the jury shall believe from the evidence beyond a reasonable doubt that, the defendants, or either of them, is guilty as charged

in the indictment. The guilt of an accused is not to be inferred because the facts proved are consistent with his guilt, but on the contrary, before there can be a verdict of guilty you must believe beyond a reasonable doubt that the facts proved are inconsistent with his innocence. If the two conclusions can reasonably be drawn from the evidence, one of innocence and one of guilt, you should adopt the former.

The defendants have pleaded not guilty. This puts 1038 the burden of proving the charges and every material allegation in the indictment upon the Government, and you cannot find the defendants or either of them guilty unless from the evidence you believe such defendant or defendants guilty of the offenses charged in the indictment, or some one of the offenses charged in the indictment, beyond a reasonable doubt.

A reasonable doubt is what the term implies, a doubt founded upon reason. It does not mean every conceivable kind of a doubt. It does not mean a doubt that may be purely imaginary or fanciful, or one that is merely captious, or speculative. It means simply an honest doubt that appeals to reason and is founded upon reason. If, after considering the evidence in this case, you have such a doubt in your mind as would cause you or any other reasonable or prudent man or woman to pause or hesitate in a grave transaction of your own life, then you have such a doubt as the law contemplates is a reasonable doubt.

You are the sole judges of the credibility of and the weight which is to be given to the testimony of the witnesses who have testified upon this trial. In weighing the testimony of each witness, you should give it careful 1039 scrutiny and consider all of the circumstances under which the witness testified; his or her demeanor on the stand; the relation which he or she bears to the Government or to the defendants, or either of them; the manner in which he or she might be affected by the verdict; his or her manner of testifying; his or her apparent candour and fairness or lack thereof, the reasonableness or unreasonableness of his or her story, the witness' apparent intelligence or lack of intelligence, the extent to which she or he is contradicted or corroborated by other credible evidence, and, in short, any circumstances that tend to throw light upon his or her credibility. Applying the test which

I have just stated, it is for you to determine the weight which is to be given to the testimony of each witness.

If you believe that any witness has knowingly and willfully testified falsely as to any matter material to the issues in the case, you may disregard entirely the testimony of such witness, except insofar as it has been corroborated by other credible evidence or by facts and circumstances proved on the trial.

A number of witnesses alone testifying for one side or the other, should not determine, in your minds; the
1040 question of the guilt or innocence of the defendants.

That question must be determined by you after a full consideration of all of the evidence in the case.

You are not bound to believe something to be a fact simply because a witness has stated it to be a fact, if you believe from all of the evidence that such witness is mistaken, or has testified falsely concerning such alleged fact.

Circumstantial evidence is relied upon in part by the Government to establish the guilt of the defendants in this case. What is meant by circumstantial evidence in a criminal case is that proof of such facts and circumstances connected with or surrounding the commission of the crime and act charged, tends to show the guilt or innocence of the party charged, and if these facts and circumstances are sufficient to satisfy the jury of the guilt of the defendants or either of them, beyond a reasonable doubt, then such evidence is sufficient to authorize the jury to find such defendant guilty. The law sanctions the conviction whenever there is legal evidence to show the defendants guilty beyond a reasonable doubt, and circumstantial evidence is legal evidence.

1041 In order to warrant a conviction on circumstantial evidence alone, each fact necessary to the conclusion sought to be established must be proven by competent evidence beyond a reasonable doubt, and all the facts—that is, the facts necessary to the conclusion must be consistent with each other and with the main fact sought to be proved, and the circumstances taken together must be of a conclusive nature leading, on the whole, to a satisfactory conclusion, and producing, in effect, a reasonable and moral certainty that the accused committed the offense charged. It is not sufficient that the circumstances coincide with, account for, and therefore render probable the guilt of the defendants; they must exclude every other reasonable hypothesis except that of the defendants' guilt.

In considering this case and in passing upon your verdict, you are not required to set aside your own observation and experience as men and women in the affairs of life, but, on the other hand, you have a right, in considering all of the evidence, to use your common observation and the experience as men and women in the affairs of life; to say where the truth lies upon any material fact in the case.

Under the instruction which I have given you here-1042 tofore, you should scrutinize carefully the testimony of any witness who, as a Government witness, incriminates himself with others in the offense charged. The evidence of such a witness ought to be received with the very greatest care and caution, and subject to the same rules which I have given you governing other witnesses.

The law is that the jury shall consider the testimony of an accomplice and may, if the evidence warrants, find the defendant guilty upon the testimony of any accomplice alone. However, before you would be justified in arriving at a verdict upon the uncorroborated testimony of the witness Marshall alone, you should find his testimony to be clear and convincing, and to possess the characteristics of truth, and together with all other evidence in the case, convince you beyond a reasonable doubt.

Both defendants in this case have taken the stand and have testified. The defendant cannot, in a criminal case, be compelled to take the witness stand and to testify. He may do so, or he may not do so.

Whether he testifies or does not testify is a matter of his own choosing. When, however, a defendant elects to 1043 take the witness stand and testify, then you have no right to disregard his testimony merely because he is accused of a crime. When he does testify, he at once becomes the same as any other witness, and his credibility is to be tested by and subjected to the same tests as are legally applied to any other witness.

In determining the degree of credibility that should be accorded to his testimony, the jury has a right to take into consideration the fact that he is interested in the results of the prosecution, as well as his demeanor and conduct on the witness stand, and all the other elements which I have heretofore referred to which may be considered by the jury in testing the credibility of other witnesses.

It is the right and privilege of a person who is being

subjected to questioning by an agent of the United States to maintain his silence and to refuse to answer questions, and you are not to draw any inference or consider the fact that either of these defendants that have done that, as bearing on the guilt of either of such defendants who may have done so.

It is not only proper, but it is the duty of an attorney to object to the introduction of evidence which he feels goes beyond and outside of the proper rules of evidence. When attorneys object, it is in pursuance of their duties as lawyers, and when the Court rules on those objections it is in accordance with the law. You will, therefore, not harbor prejudice against any attorneys or their clients who have objected to any evidence, nor draw any inference of desire for concealment because evidence has been ruled out. I can only assure you that my rulings have been made in an effort to comply with the established rules of law, and you will, therefore, disregard any evidence which has been ordered stricken from the record, and in arriving at your verdict, you will be governed entirely by the evidence which is in the record before you and by the law as I have given it to you in these instructions.

Neither by these instructions nor by anything the Court may have done or said during the trial, does or did the Court intimate or wish to be understood by the jury as giving an opinion as to what the evidence is in this case, or as to what is not the evidence, or as to what the facts are in this case, or as to what are not the facts, or as to what the Court thinks should be the finding of the jury in this case. It is exclusively for the jury to determine the facts from the evidence in the case, and having done so, to apply to such facts the law as stated in these instructions.

You should not allow sympathy or prejudice to influence your deliberations. You should not be influenced by anything other than the law and the evidence in the case. Nor are you to concern yourselves with the matter of punishment in the event that the defendants or either of them are found guilty. The matter of punishment, in the event that the defendants or either of them is found guilty, is for the Court alone. It is your duty to pass upon the guilt or innocence of each of these defendants, and in that regard you

will take with you to your jury room the exhibits that have been received in evidence, and you will take with you also two sets of verdicts, each set containing three forms.

Upon arriving at your jury room you will elect one of your number foreman to preside over your deliberations, and you will deliberate until you arrive at a unanimous verdict.

A set of forms is provided for each defendant. There are three forms in each set. The first applies to the defendant, Kenneth C. Gordon. The first form reads:

1046 "We, the jury, find the defendant, Kenneth C. Gordon, guilty as charged in the indictment."

You will use that form if you should find the defendant guilty on all four counts of the indictment.

The next form reads,

"We, the jury, find the defendant, Kenneth C. Gordon, not guilty as charged in the indictment."

You will use that form if you find the defendant Gordon not guilty on all four counts of the indictment.

The third form reads,

"We, the jury, find the defendant Kenneth C. Gordon, guilty as charged in Count of the indictment, and find the said defendant not guilty as charged in Count of the indictment."

You will use that form if you find the defendant guilty on some counts, and not guilty on other counts, and the foreman will insert the numbers of the counts on which the defendant is found guilty and those on which he is found not guilty.

1047 The set of forms regarding the defendant, Kenneth J. MacLeod, read the same way and will be used the same way for that defendant.

Upon arriving at your verdict, the foreman will select the proper form to express your verdict, and will complete it, if it needs completion, and will sign the same first. The other eleven will sign after him.

The married ladies on the jury will please remember to sign your own names and not your husbands' names. Sign either Mrs. Mary Smith or Mary Smith, but please do not sign Mrs. John Smith, for example.

Opportunity will be given to counsel out of the hearing of the jury to object to the charge of the Court. Do counsel desire to be heard?

Step into Chambers with the Reporter.

(The following proceedings were had in Chambers out of the hearing and presence of the jury:)

The Court: Any objections on behalf of the Government?

Mr. Downing: No objections.

The Court: No objections on behalf of the government.

On behalf of the defendant Gordon?

Mr. Callaghan: I got one marked "R" here. The defendant submitted to your Honor an instruction as follows:

"You are hereby instructed that if you find from the evidence that any witness for the prosecution has been promised immunity or reward or has received immunity from prosecution for any testimony given by him in this case or anticipated immunity as a result of or dependent upon his testimony, then you are entitled to consider that fact in weighing his credibility and truthfulness as a witness. And the testimony of any such person so promised or given immunity or reward should be received with suspicion and considered and scrutinized with the very greatest of care and caution."

I request your Honor now to so charge the jury.

The Court: You object to my not having so charged the jury?

Mr. Callaghan: I object to your not having so charged the jury.

The Court: Any other objections?

Mr. Callaghan: At one point in the charge, your Honor referred to establishing the guilt or innocence of either or both defendants and that, I think, was with respect to Counts 2 and 4 of the indictment, when your Honor was telling the jury that it was necessary that the defendants must have guilty knowledge. And I think your Honor said to the jury that the knowledge was sufficient if it was shown to have been had by either. Your Honor changed it to either or both defendants. I think in the form given the charge was bad. I except to it.

The Court: Is that all?

Mr. Callaghan: Yes.

The Court: The objections are each and both overruled.

Objections on behalf of the defendant MacLeod.

Mr. Walsh: Your Honor, I object to the instruction given substantially as follows:

"Possession of property recently stolen, if unexplained, is a circumstance tending to show guilty knowledge on the part of the accused that the goods were stolen—"

It is my suggestion that "unexplained" should be followed by the words "by the facts and surrounding circumstances."

The Court: Do you object to the charge as given?

Mr. Walsh: I object to the charge as given.

The Court: Very well.

Mr. Callaghan: May I join in that? I intended to make an objection, to that. It is marked Government's instruction 6. I think that is the instruction as your Honor gave it:

"Possession of property recently stolen, if unexplained, is a circumstance tending to show guilty knowledge on the part of the accused that the goods were stolen, yet if the jury believe from the evidence that such defendant came honestly into the possession of the property, or that the possession by the accused is unconnected with any suspicious circumstances of guilt, this would be a satisfactory account of his possession, and would remove—"

1051 and so on. I think that that construction casts the burden of proof upon the defendants in this case, and I except to the giving of that instruction.

The Court: "Objection overruled as to both defendants.

Mr. Walsh: To the same instruction, I would like to offer an objection to the other part included in that:

"or that the possession by the accused is unconnected with any suspicious circumstances of guilt—"
is giving the jury possible authority to find a verdict of guilty based merely on suspicious circumstances.

I object to the instruction on aiding and abetting, because it did not include the statement that such aiding and abetting must be done with the intent and knowledge necessary on the part of a principal.

I further object to the use of the word accomplice in the instruction concerning the testimony of a person who had testified to his part in the crime. The use of the word accomplice implies, accomplice implies guilt of the defendants who are on trial. It tends to take away from the jury to ultimate question of fact of their guilt.

1052 The Court: Any other objections?

Mr. Walsh: No.

The Court: The objections on behalf of the defendant MacLeod are each and all overruled.

(The following proceedings were had in the court room in the presence and hearing of the jury:)

The Court: The alternate juror Eleonore Weiss, is excused, and will leave the jury box and the jury room. I thank you for your attendance on the trial.

(Thereupon, the alternate juror, Eleonore Weiss, was excused.)

The Court: The Marshals will rise and be sworn.

(The Marshals were sworn)

The Court: Has the alternate juror left the jury room?

A Marshal: Yes, your Honor.

The Court: The jury will retire and deliberate upon its verdict.

(Thereupon, the jury retired to the jury room to consider of its verdict; and the following additional proceedings were had in the court room, out of the hearing and presence of the jury:)

The Court: Assemble the exhibits, gentlemen.

Mr. Callaghan: We have one.

The Court: That is that price exhibit. It was those index cards.

Mr. Callaghan: The tabs.

The Court: You better see that they are assembled.

Mr. Callaghan: Yes, your Honor.

The Court: What is the difficulty?

Mr. Callaghan: Only this, that on Government's exhibit 78, your Honor said he wouldn't permit in evidence any figures on the left hand side of that. That is all.

The Court: Yes.

Mr. Callaghan: Mr. Downing has left in "5.50 at". I think the "at" ought to be taken out and just leave the numbers.

The Court: Just the figures on the left hand side.

1054 Mr. Downing: I will be glad to.

Mr. Callaghan: Your Honor suggested cutting it in half.

The Court: The printing on the other side would not show. Just scratch out the word "at."

Mr. Callaghan: Everything except the figures on the left hand corner.

The Court: Right.

Mr. Downing: May the record show I am doing as has been suggested by the Court on Government's exhibit 78.

The Court: All right. Let me see it.

Mr. Downing: Yes, sir.

The Court: Exhibit 78 is now sufficiently obliterated.

Mr. Downing: This is Marshall, what he identified. They are looking at Government's exhibit 83, inquiring as to the notations made by what the witness, Marshall, testified, or his notations.

Mr. Callaghan: I think this document made 8-25-50, J.M., meaning James Marshall, we ask that be obliterated at the time "it is written evidence taken from me" and so on.

1055 The Court: Having heard you read it I can recognize it "taken from me 8-25-50, J.M." That can be scratched out. I do not see any reason for that being on. You can obliterate that and obliterating that, the rest of the exhibit will go in.

Mr. Downing: Let the record show I am obliterating as directed the portion of Government's exhibit 83.

The Court: The record may so show.

How about all of those exhibits?

Mr. Downing: Those ought to go in.

Mr. Walsh: This exhibit 91 shows "Mehegan, FBI, Wednesday, 4:30 p.m., 11-29-50" which is corroboration of his statement that they had found it on the floor there or something on that date. That was the date. This is the slip.

Mr. Downing: It is Mehegan's note.

The Court: Of course, you would object if the initials were not on or he did not initial it and put the date on. Then you would object to it. Now you object to it being on there. It is made up, where it says "Mehegan, FBI."

Mr. Callaghan: And the date.

Mr. Downing: It is no different than all of these
1056 other boxes where we have got the identifying initials and names.

Mr. Callaghan: We do not object to the initials on it alone.

Mr. Downing: What are you objecting to? That is just what is on there.

The Court: 4:30 p.m., 11-29.

Mr. Downing: That is the date.

The Court: Well, we will scratch out "Wednesday, 4:30 p.m." and leave "Mehegan, W.J.M." which I think was Mr. McCormick, "11-29-50," which appears there, we will scratch out the rest.

Any other objections?

Mr. Callaghan: Yes, if your Honor please. On Government's exhibits No. 72 and No. 73, there is some evidence in corroboration of the testimony of the witness Hawken. That, I think, ought to be obliterated before it goes to the jury.

Mr. Downing: I object to any obliteration. I think that is a perfectly proper record that was made in the regular course of business.

The Court: You object, do you?

Mr. Downing: Yes, I do.

Mr. Callaghan: On this trailer.

1057 The Court: I ruled on that at the time the exhibit was offered and overruled your objection. They have obliterated that which I ordered them to obliterate. Your objection is again overruled. The exhibits will go in-in their present form. Have you got all the exhibits assembled now? You can take them into the jury, Mr. Marshal.

Mr. Downing: That includes the boxes.

The Court: They will go in. All exhibits received in evidence will go to the jury corrected as indicated.

Well, gentlemen, you better remain in attendance upon the Court. When and if the verdict is arrived at you will be telephoned at your offices and you can come back.

Mr. Callaghan: I was just going to ask you about that, what arrangements should be made.

The Court: Rather than staying in the court room, suppose you have your defendants with you or subject to telephone call, and leave your numbers where you will be, and be at that address so that if the Clerk calls you, you will be available.

Mr. Downing: May we go out to lunch?

1058 The Court: Yes, but the jury will have their lunch served in the jury room. You may go out for lunch between 12:30 and 2. All right, then be available from 2 o'clock on. The jury will have their lunch in the jury room. We will recess now until the return of the jury.

(Thereupon, a recess was taken at 11 a.m., until 10:30 p.m. of the same day, and the following additional proceedings were had out of the presence and hearing of the jury)

The Court: Mr. Marshal, what is the present report from the jury, if any? Did you give them their dinner?

Marshall Shanahan: I did, your Honor.

The Court: No further report?

Marshall Shanahan: No. They can't get along, I guess.

The Court: Counsel are now advised that the jury having been out since 11:05 this morning, it now being 10:35 p.m., the Court will summon the jury to the jury room and deliver the charge in the Allen case.

I have here the charge in writing and counsel, I 1059 think, all of you are familiar with it. If you care to look at it, you may. It will be given exactly word for word as it is written here and as taken from Allen vs. United States, 164 U.S. 492, and at this time you may make such

Do you care to make any to the delivery of the charge? objections as you care to.

Mr. Downing: The Government has no objection.

The Court: The Government has no objection. On behalf of the defendants?

Mr. Callaghan: The defendants object to it, if your Honor please.

The Court: You want to speak for both?

Mr. Callaghan: Yes.

The Court: On behalf of both defendants, Mr. Callaghan?

Mr. Callaghan: The defendants now severally and separately object to the giving of that charge on the ground that the charge is coercive in manner and giving of it would be most highly prejudicial to these defendants.

The Court: Do you have anything to add to it, Mr. Walsh?

Mr. Walsh: I object to the charge as outlined in 1060 the Allen case on the ground that it tells the jury that the case must some time be decided, which is not the fact nor the law, as I understand it.

Mr. Callaghan: Now, may it be understood, if your Honor please, that this objection will suffice and I need not make it in the presence of the jury, and except to the giving of the charge, and the record may show so the Government may take no advantage of an exception being made in the presence of the jury.

Mr. Downing: The Government will not make any advantage of it.

The Court: The record may show that no point is to be made of the fact that the objection or exception was not made in the presence of the jury.

At this time the Court will simply give the charge and again direct the jury to retire to the jury room. You will join me in the court room now, gentlemen.

Mr. Callaghan: May I respectfully add this also? You may get some inquiries from the jury, your Honor, also in the court room. They may ask your Honor questions and

I submit no questions should be answered to the jury, 1061 nor should any question be directed to the jury to ascertain how they stand.

The Court: Yes. I agree with you on that. I know that some judges inquire of the jury how they stand before giving the Allen charge. I don't think that is good practice.

Mr. Callaghan: It has been condemned.

The Court: I shall not inquire of the jury and if the jury asks for further instructions, counsel are advised so that it will be unnecessary for them to make the point in the court room, that if the jury asks for further instructions or asks any questions, the Court will advise them that the instructions they have already been given are sufficient and should guide their further deliberations.

Mr. Downing: That is agreeable with the Government.

The Court: All right.

Mr. Downing: I presume it is agreeable with the defendants.

The Court: They raised the point, certainly. Very good. All right.

(The following proceedings were had in the court 1062 room in the presence and hearing of the jury:)

The Court: Ladies and gentlemen, I have a further instruction to give you.

The mode provided by our Constitution and Laws for deciding questions of fact in cases such as this is by verdict of a jury. In a large proportion of cases and perhaps, strictly speaking, in all cases, absolute certainty cannot be attained or expected. Although the verdict to which each juror agrees must of course be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusions of his fellows, yet in order to bring 12 minds to a unanimous result, you must examine any ques-

tions submitted to you with dandor and with a proper regard and deference to the opinions of others. You should consider that the case must at some time be decided; that you were selected in the same manner and from the same source from which any future jury must come, and there is no reason to suppose that the case will ever be submitted to 12 men and women more intelligent, more impartial or more competent to decide it, nor that more or clearer evidence will be produced on the one side or the other.

1063 With this in view it is your duty to decide the case, if you can conscientiously do so. In order to make it more practicable the law imposes the burden of proof on one party or the other in all cases. In the present case the burden is upon the Government to establish the guilt of the defendants beyond a reasonable doubt, and if you are left in doubt as to the guilt of the defendant, the defendant is entitled to the benefit of that doubt, and must be acquitted. But in conferring together you ought to pay proper respect to each other's opinions and reasons with a disposition to be convinced with each other's arguments, and on the one hand if much the larger number of you are for a conviction, the dissenting jurors should consider whether the doubt in their own minds is a reasonable one which makes no impression upon the minds of so many men and women equally honest, equally intelligent, and who have heard the same evidence with the same attention, and with an equal desire to arrive at the truth and under the sanction of the same oath. And, on the other hand, if the majority of you are for acquittal the minority should equally ask themselves whether they may not reasonably and ought not to doubt the correctness of the judgment which is not concurred in by a number of those with whom they are
1064 associated, and distrust the weight or sufficiency of that evidence which fails to carry conviction in the minds of their fellows.

You will now return to your jury room and continue your deliberations. We will be in recess until return of the jury.

(Whereupon, at 10:45 p.m., a recess was taken until the return of the jury at 3:10 a.m., Friday, June 8, 1951, and the following additional proceedings were had in the court room, in the presence and hearing of the jury:)

The Court: I am informed you have arrived at a verdict, is that correct?

Foreman Harmer: We have arrived at a verdict, your Honor.

The Court: Would you deliver it to the Marshal, please?
The Marshal will deliver it to the Clerk and the Clerk will read the verdict.

The Clerk: (reading)

"Verdict. We, the jury, find Kenneth C. Gordon, guilty as charged in the indictment." (Signed) Robert R. Harmer, Foreman, and 11 other jurors.

1065 "Verdict. We, the jury, find the defendant, Kenneth J. MacLeod, guilty as charged in the indictment." (Signed) Robert R. Harmer, Foreman, and 11 other jurors.

Mr. Walsh: The defendant MacLeod asks that the jury be polled.

The Court: Very well. The Clerk will poll the jury.

The Clerk: The jury, as his or her name is called, will be asked the question "Was this and is this now your verdict," and you will answer it was and it is, if that is the answer.

The Clerk: Betty F. Vatter, was this—

Mr. Callaghan: May I respectfully suggest that the juror be given an opportunity to answer in the alternative, if it is not?

The Court: Certainly.

The Clerk: Betty F. Vatter, was this and is this now your verdict?

Juror Vatter: It was and it is.

The Clerk: Edith Siegel, was this and is this now your verdict?

Juror Siegel: It was and it is.

1066 The Clerk: Norma Reszel, was this and is this now your verdict?

Juror Reszel: Yes, sir.

The Clerk: Mrs. Ida Potts, was this and is this now your verdict?

Juror Potts: Yes.

The Clerk: Samuel H. Newman, was this and is this now your verdict?

Juror Newman: It is.

The Clerk: Helen Lyman, was this and is this now your verdict?

Juror Lyman: It was and it is.

The Clerk: Joseph Gill, was this and is this now your verdict?

Juror Gill: It was and it is.

The Clerk: Raymond C. Eagan, was this and is this now your verdict?

Juror Eagan: It was and it is.

The Clerk: Ruth Fritz, was this and is this now your verdict?

Juror Fritz: Yes.

The Clerk: Emma Dreher, was this and is this now your verdict?

Juror Dreher: It was and it is.

1067 The Clerk: Anna Golditz, was this and is this now your verdict?

Juror Golditz: It was and it is.

The Clerk: Robert R. Harmer, was this and is this now your verdict?

Juror Harmer: It was and it is.

The Clerk: So say you all.

The Court: Judgment on the verdict.

Ladies and gentlemen, you are excused from further attendance at this Court. I want to thank you for your time and attention that you have given to the case. I think if you will leave your cards with the Marshal he will arrange for the payment of the jurors' fees, etc. And you better wait here and let Mr. Sutton and the jurors get out. The jury is excused from further attendance. Thank you very much.

(Thereupon, the jury was excused, and the following additional proceedings were had in the court room:)

Mr. Callaghan: The defendant Gordon, if your Honor please, moves for a judgment of acquittal, notwithstanding the verdict, and in the alternative that he be granted a new trial.

The Court: If you care to be heard in argument
1068 I will set a date for you.

Mr. Callaghan: Yes, your Honor.

Mr. Walsh: The same motion for defendant MacLeod.

The Court: We will set those motions for argument on a week from today, that is the 15th of June, at 2 p.m.

1071 Certificate of Court Reporter.

1082 And afterwards, to wit, on the 4th day of June, 1951, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell, District Judge, appears the following entry, to wit:

1083

IN THE UNITED STATES DISTRICT COURT

• • • (Caption—No. 50 CR 641) • • •

This being the day to which this cause was continued for further trial again comes the United States by the United States Attorney come also the defendants in their own proper persons and by their counsel and the Jury and Alternate Juror heretofore elected, empaneled and sworn herein for the trial of this cause also come and trial of this cause proceeds and at the close of the evidence on behalf of the United States each defendant enters herein his motion that the Government produce the record of the Grand Jury hearing in this case and the Court having heard the arguments of counsel and being fully advised in the premises said motions are denied whereupon each defendant enters his motion for judgment of acquittal separately as to each count of the Indictment and the Court having heard the arguments of counsel and being fully advised in the premises said motions are denied and the hour of adjournment having arrived it is

• ORDERED that the Jury and Alternate Juror be permitted to separate until 10 A.M. June 5, 1951.

1084 And afterwards on, to wit, the 5th day of June, 1951 there were filed in the Clerk's office of said Court certain Instructions submitted by defendant Gordon, in words and figures following, to wit:

1085

IN THE UNITED STATES DISTRICT COURT

• • • (Caption—No. 50 CR 641) • • •

SUGGESTIONS FOR CHARGE TO THE JURY

Ladies and Gentlemen of the Jury:

The Grand Jury of this judicial district has returned an indictment against the defendants charging them with

offenses against the laws of the United States.

The defendants have entered a plea of not guilty. That means that they deny every material allegation in the Indictment.

1086. INDICTMENT NOT EVIDENCE:

The Indictment is not evidence and the jurors must not regard it as any evidence of the guilt of the defendants. It is not to be treated by you in any way as raising any kind of presumption or creating any kind of prejudice against the defendants. It is the mere paper or formal charge made by the Grand Jury. You must regard this Indictment in that light and in no other light. The defendants, until this trial was had, have not had an opportunity to answer the charges made in the Indictment.

PRESUMPTION OF INNOCENCE:

Every person charged with a criminal act is by the law presumed to be innocent of that charge; that the defendants are entitled to this presumption of innocence during your deliberations and until such time as the Government, by evidence, has convinced you beyond a reasonable doubt to the contrary.

By that I mean, this presumption of innocence was with the defendants not only when the Indictment was returned, when they were arraigned, when they pleaded and throughout the whole trial, but always, until such time as the evidence establishes to your satisfaction their guilt beyond a reasonable doubt. This presumption of innocence is no mere idle theory, to be cast aside by the jury through mere caprice, passion, or prejudice, but it is a substantial part of the law of the land, and follows the defendants throughout the entire case, and must not be lost sight of by the jury until it has been overcome by evidence which establishes the defendants' guilt beyond all reasonable doubt, and to a moral certainty.

You should consider this presumption with all the other evidence in the case, weigh it carefully and if from such consideration of the evidence you have a reasonable doubt as to the guilt of the defendants, then you should find them not guilty.

1087 If upon a fair and impartial consideration of all the evidence in the case you find that there are two reasonable theories equally supported by the evidence and that one of such theories is consistent with the guilt of the de-

defendants, and the other is consistent with the innocence of the defendants, then it is the policy of the law, and the law makes it the duty of the jury to adopt that theory which is consistent with the innocence of the defendants, and to find the defendants not guilty.

BURDEN OF PROOF:

The Court instructs the jury that the number of witnesses alone testifying for one side or the other should not determine the question of the guilt, or innocence of the defendants, and simply because the prosecution may have produced more witnesses than the defense is no reason why you should believe that the prosecution has proven its case beyond all reasonable doubt. Before you can determine the guilt or innocence of the defendants, it is your duty to consider all the evidence, both that for the prosecution and that for the defense.

It is not sufficient to warrant a conviction of the defendants in this case, for the prosecution to awaken in your minds a suspicion that the defendants committed the offenses alleged in the Indictment. Neither is it sufficient for the prosecution to satisfy your minds that it is more probable that the defendants committed the offenses, or any offense mentioned in the Indictment, than that they did not. Before you are justified in finding the defendants guilty, the prosecution must go further and prove the alleged offense against the defendants beyond a reasonable doubt.

1088 You are instructed that any defendant is a competent witness in his own behalf; and you have no right to discredit his testimony from caprice or prejudice, nor merely because he is a defendant and stands charged with the commission of a crime. The law presumes the defendant to be innocent, until he is proven guilty, and the law allows him to testify in his own behalf, and the jury should fairly and impartially consider his testimony with all the other evidence in the case, and if, from all the evidence, the jury have any reasonable doubt as to the guilt of the defendant, they should give the defendant the benefit of such doubt and acquit him.

1089 WITNESSES:

The Court instructs the jury that if you believe from the evidence that any witness has wilfully and knowingly sworn falsely on this trial to any matter or thing material

to the issues in the case, then the jury are at liberty to disregard his or her entire testimony, except insofar, if at all, as it may have been corroborated by other credible evidence, or, by facts and circumstances proved on the trial.

1090 The jury are instructed that the law, in regard to circumstantial evidence, is this: In order to justify a jury in finding a verdict of guilty based on circumstantial evidence, the circumstances must not only be consistent with the guilt of the defendant, but they must be inconsistent with any other reasonable hypothesis that can be predicated on the evidence; or, stated in another form, it is not sufficient that the circumstances proved coincide with, account for, and therefore render probable the hypothesis of guilt asserted by the prosecution, but they must exclude to a moral certainty and beyond a reasonable doubt, every other hypothesis but the single one of guilt, or the jury must find the defendant not guilty. In order to warrant a conviction of crime on circumstantial evidence, each fact necessary to the conclusion sought to be established must be proved by competent evidence beyond a reasonable doubt. All the facts necessary to the conclusion must be consistent with each other and with the main fact sought to be proved; and the circumstances, taken together, must be of a conclusive nature, leading on the whole to a satisfactory conclusion, and producing, in effect, a reasonable and moral certainty that the defendant committed the offense charged; and unless the evidence does so it will be your duty to acquit the defendant.

I charge you that if the evidence is circumstantial, the links in the chain of circumstances must be clearly proven and if taken together must point,—not to the possibility or probability,—but to the moral certainty of guilt and the inference which may be reasonably drawn from them must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence.

1091 Mere possession by a defendant of the articles mentioned in the Indictment is not sufficient for you to convict such defendant of the charge in this Indictment. Before you may convict the defendant you must find from the evidence beyond reasonable doubt that the defendant possessed the articles knowing them to have been stolen.

1092 Before you find any defendant guilty under Counts

1 and 3 in this case, it is incumbent upon the Government to prove beyond a reasonable doubt the following:

First: That the property in this case had been stolen;

Second: That the theft of the property was from the carrier described while the said property was moving as part of an interstate shipment of freight as alleged in the Indictment; and.

Third: That the defendant possessed said property; and

Fourth: That at the time he possessed it that he knew the property was stolen.

1093. Before you can find any defendant guilty under Counts 1 and 3 of this Indictment, you must believe from all the evidence and beyond a reasonable doubt: That the goods described were stolen as charged; that at the time they were stolen, if you so find, they were moving as, or were part of, or constituted an interstate shipment of freight; that the goods, or some of them, came into the possession of such defendant; and that at the time they came into the possession of the defendant he knew that they were stolen goods.

1094 One of the methods of impeaching or impairing the testimony of a witness is to show that on a material point he has made other or different or conflicting statements at some other time and this is one of the matters you should take into consideration in considering the credibility of any witness.

1095 The essence of the crime charged in Counts 1 and 3 of this Indictment, that is, the charge of possessing goods stolen from interstate shipment, is guilty knowledge on the part of the accused that the goods were stolen. It is not a crime to possess stolen property. The crime consists in possessing it, knowing it to have been stolen, and you cannot find the defendants or either of them guilty unless you believe beyond a reasonable doubt that they knew that the goods were stolen.

1096 You should scrutinize very carefully the testimony of any witness who has turned "government witness" insofar as to incriminate himself, or with others in the offense charged. That evidence is not to be taken as that of an ordinary witness of good character. On the contrary the evidence of such a witness ought to be received with suspicion, and with the very greatest care and caution, and

ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses.

1097 The Court instructs you that before you would be justified in arriving at a verdict upon the uncorroborated testimony of the witness Marshall you should find this testimony to be clear and convincing and to possess the characteristics of truth, and together with all other evidence in the case, convince you beyond and to the exclusion of every reasonable doubt. You are directed to carefully weigh the testimony of the witness Marshall and you should not place undue reliance upon such testimony, unless after a careful examination of it, applying the tests I have stated, you are satisfied beyond a reasonable doubt of its truth.

1098 You are hereby instructed that if you find from the evidence that any witness for the prosecution has been promised immunity or reward or has received immunity from prosecution for any testimony given by him in this case or anticipated immunity as a result of or dependent upon his testimony, then you are entitled to consider that fact in weighing his credibility and truthfulness as a witness. And the testimony of any such person so promised or given immunity or reward should be received with suspicion and considered and scrutinized with the very greatest of care and caution.

1099 Testimony has been admitted in this trial by the witness Marshall as to an event which he says occurred on July 22, 1950. You are instructed that in so far as the defendant MacLeod is concerned, you are to completely disregard that testimony.

You are further instructed that you are not to consider such evidence against the defendant Gordon as any proof of the substantive offenses charged in this Indictment. The Indictment does not charge any offense against either of these defendants as occurring on July 22, 1950. Such testimony was admitted solely on the question of intent on the part of the defendant Gordon and any testimony of the witness Marshall as to that occurrence, if you believe it did occur, is to be considered by you for that purpose and for no other purpose.

1100 You are instructed that before you can find the defendants or either of them guilty under the charges

contained in Counts 2 and 4 of this Indictment, the Government must prove beyond a reasonable doubt each of the following items:

1. That the defendants knowingly transported in interstate commerce, that is, from the City of Chicago in the State of Illinois, to the City of Detroit in the State of Michigan, the merchandise described in those counts;
2. That the merchandise so transported had theretofore been stolen;
3. That the said merchandise at the time it was transported from Chicago, Illinois, to Detroit, Michigan, was of a value of more than \$5,000.00;
4. And that the defendants, at the time the said merchandise was transported, knew that it was stolen merchandise.

If the Government fails to prove to your satisfaction beyond a reasonable doubt any of the aforementioned facts, you must find the defendants not guilty on the charges contained in Counts 2 and 4.

1101 The Court instructs the jury that if they believe from the evidence that any person was induced to become a witness and testify in this case by any promise of immunity from punishment or by any hope held out to him by any one that it would go easier with him in case he disclosed who his confederate was or in case he implicated some one else in the crime, then the jury should take such facts into consideration in determining the weight which ought to be given to his testimony thus obtained and given under the influence of such promise or hope.

1102 And on, the same day to wit, the 5th day of June, 1951 there were filed in the Clerk's office of said Court certain Instructions Submitted By Defendant Mac Leod, in words and figures following, to wit:

1103 The Court instructs the jury that the only charges pending against those Defendants, for determination by this jury, are the charges in the Indictment, and the jury is not to consider any evidence concerning film not mentioned in the Indictment, other than as a circumstance that may relate to the guilt or innocence of the Defendants with regard to the charges in the Counts of the Indictment.

You are instructed that the guilt or innocence of each Defendant is to be determined separately, and that the

guilt or innocence of each Defendant is to be determined separately on each count.

1104. You are instructed that certain evidence was admitted concerning the date of July 22, 1950, as against the Defendant GORDON and excluded as to the Defendant MC LEOD.

You are instructed that any evidence concerning July 22, 1950, is not to be considered by you as against the Defendant MC LEOD.

1105 The Court instructs the jury that the guilt or innocence of the Defendants is to be determined separately, and that as to each Defendant only that evidence which was admitted by the Court against the respective Defendant is to be considered in determining individual innocence or guilt.

1105½ You are instructed as to Counts Two (2) and Four (4) of the Indictment, that it is necessary that the Defendants knew and intended that the merchandise involved in said Counts was to be transported in interstate commerce from Chicago, Illinois to Detroit, Michigan, and that they, or either of them, actively participated in, and aided such transportation, with the knowledge and intent that it was to be transported in interstate commerce to Detroit, Michigan from Chicago, Illinois.

1106 The Court instructs the jury that in determining the value under Count Two (2) and Count (4), they should consider the language of the statute, which reads as follows:

“ ‘Value’ means the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares and merchandise, securities and money referred to in a single count shall constitute the value thereof.”

In determining the value referred to, you should consider the testimony of the witnesses who testified as to value, their apparent knowledge of the value and their ability to know the facts about which they testified. You should consider their experience and familiarity with these matters. You are not required to accept any arbitrary or particular figures testified to unless you are convinced, beyond all reasonable doubt, that said figures truly represent the value of the film involved in the individual counts.

1107 The Court instructs the jury that the value of the merchandise involved in Counts two and four, is one of the elements involved in that offense, and that this element of the offense must be proved beyond reasonable doubt, as must every other essential element of the offense, that is, unless you are convinced from the evidence, beyond reasonable doubt, that the Defendants, or either of them, transported the film referred to in said Counts from Chicago, Illinois to Detroit, Michigan, and that said film at the time of said transportation was stolen, and that the Defendant, or Defendants, knew at the time of said transportation that said film was stolen, and it must be proved beyond reasonable doubt that said film had a value of \$5,000.00 or more.

1108 And afterwards on, to wit, the 6th day of June, 1951 came the Defendant, Kenneth Gordon and Kenneth MacLeod, by their attorneys and filed in the Clerk's office of said Court their certain Motion in words and figures following, to wit:

1109

IN THE UNITED STATES DISTRICT COURT

* * * (Caption—No. 50 CR 641) * * *

MOTION

Now come the defendants, by leave of Court first had and obtained, and file and make part of the record in this cause in support of their several motions for mistrial, the newspaper articles which have appeared in daily newspapers published in the City of Chicago since the beginning of this trial and shortly prior thereto.

Kenneth Gordon
Kenneth MacLeod

Defendants

1110 SUSPECT BALKS LIE TEST OVER WITNESS' DEATH

U.S. Court Refuses Delay in \$12,000 Theft Case
Dwight L. Sweet, 26, of 2455 Dalton st., a bartender, changed his mind yesterday after agreeing to a lie detector test in the slaying of Albert Swartz, 43, of Ferndale, Mich., a jeweler and key witness in a Chicago stolen property trial.

He agreed, however, to waive extradition to Michigan for further questioning. Police Sgt. Hiram Phipps of Detroit, who came here, said he would send for extradition papers to make certain that Sweet does not back out.

\$12,000 Camera Film Stolen

Swartz, indicted with two others for possessing \$12,000 worth of camera film stolen in Chicago from an interstate shipment, pleaded guilty last April 10 and agreed to testify against his codefendants.

They are Kenneth Gordon, 28, of 515 Roscoe st., owner of the Liberal Jewelers, 21 East Adams st., and Kenneth J. MacLeod, 37, of 1150 Lake Shore dr., owner of a rooming house for girls. Both men have pleaded not guilty.

Sweet, arrested Tuesday night in a N. Clark st. tavern where he is bartender, denied complicity in Swartz' assassination. He said he was "out doing the town" with Gordon Wednesday night and early Thursday.

Delay in Trial Refused

Sgt. Phipps said a Dwight L. Sweet registered in the Tuller hotel in Detroit that night. Ferndale is a Detroit suburb. Phipps also said a draft card and driver's license issued to a Dwight L. Sweet were found two days later in a rented automobile left in a Detroit parking lot.

Judge William J. Campbell in federal District court yesterday refused to delay the trial of Gordon and MacLeod, set for Monday, but agreed to hear a motion to quash the indictment.

Defense Attorneys George C. Callaghan and Maurice J. Walsh sought the delay on the ground that publicity as to Swartz' slaying had made it impossible to get a fair trial of the camera film case now. The trial, first set for next month, was moved up at the government's request after Swartz was slain.

Prosecutor's Plea Denied

Judge Campbell also refused to raise bonds for Gordon and MacLeod from \$2,500 to \$25,000 each. Assistant United States Atty. Robert J. Downing, who cited the Swartz slaying in seeking the increase, admitted there was no "specific" evidence linking Gordon and MacLeod to the killing.

Downing also mentioned the wounding of James I. Marshall, 29, also of Ferndale and also a jeweler, last Nov. 20. Marshall is scheduled to testify against Gordon and

MacLeod. Downing said John Mundo, 37, a bartender, serving 15 to 30 years for the shooting, was an "associate" of Gordon.

U. S. TO SPEED TRIAL; 1 WITNESS ALREADY SLAIN

The government acted yesterday to speed up the trial of Kenneth Gordon, 28, of 518 Roscoe st., jeweler, and Kenneth MacLeod, 37, of 1150 Lake Shore dr., rooming house owner, on a charge of possessing \$12,000 worth of photographic film stolen from a shipment last July 10.

Judge Michael L. Igoe in federal District court granted a request of Assistant United States Atty. Robert J. Downing for return of the case to the court's executive committee. The committee reassigned the case to Judge William Campbell and trial was set for next Monday.

Downing said the action was taken because Albert Swartz, 45, a defendant in the case, who had agreed to testify against the other defendants, was slain by unidentified assassins last Thursday in Ferndale, Mich. A government witness, James I. Marshall, 29, of Ferndale, a jeweler, who was wounded in a shooting last November, has been ordered put under guard until the trial.

TWO ARE IDENTIFIED AS POSSESSORS OF STOLEN CAMERA FILM

James I. Marshall, 33, of Highland Park, Mich., yesterday identified two defendants in a federal District court trial here as the men from whom 34 cases of stolen camera film had been obtained.

They are Kenneth Gordon, 28, of 515 Roscoe st., and Kenneth MacLeod, 37, of 1150 Lake Shore dr., who are on trial before Judge William J. Campbell and a jury on charges of possessing goods stolen from an interstate shipment.

Marshall pointed them out as the men from whom he and Albert Swartz, 43, a Detroit jeweler, obtained the film last July 20.

Gangland assassins slew Swartz outside his home on May 17, after he pleaded guilty for possessing some of the film. It was part of \$12,000 worth stolen from a truck

parked at 1833 S. Canal st. last July 10. Swartz had been expected to testify in the current trial that he received the film from Gordon and MacLeod.

JURORS CHOSEN IN STOLEN FILM TRIAL OF 2 MEN

A jury of eight women and four men was selected yesterday before Federal Judge William J. Campbell in the trial of Kenneth Gordon, 28, of 515 Roscoe st., and Kenneth MacLeod, 37, of 1150 N. Lake Shore dr., charged with possessing \$12,000 in stolen camera film.

The trial was advanced two weeks ahead of its scheduled opening at the government's request after Albert F. Swartz, 43, a Ferndale, Mich., jeweler who had pleaded guilty to the same charge and was scheduled to testify against Gordon and MacLeod, was slain May 17 in gangland fashion outside his home. James I. Marshall, 29, a Ferndale jeweler who was wounded in a similar attack last Nov. 20, has been under guard since Swartz' death.

Government attorneys charged Gordon and MacLeod sold the film to Swartz and Marshall after it was stolen from a truck parked at 1833 S. Canal st., last July 20. The loot was part of a shipment valued at \$27,423 consigned from the Eastman Kodak company, Rochester, N. Y., to its Chicago branch office.

1111 FBI AGENT TELLS OF USING WALKIE TALKIE IN SPYING

A jury in federal District court yesterday was regaled with the story of how a federal bureau of investigation agent, armed with a walkie talkie radio, spied on a rooming house at 215 E. Erie st. from a washroom in the Popular Mechanics building at 200 E. Ontario st.

The agent, Walter Higgs, was testifying in the trial of Kenneth Gordon, 28, of 515 Roscoe st., and Kenneth MacLeod, 37, of 1150 Lake Shore dr., on a charge of possessing a quantity of photographic film stolen from an interstate shipment.

Higgs testified that on July 27 last year he took up his post at the washroom window to watch the rooming house, which is jointly operated by Gordon and MacLeod. About 1 p. m., he said, an automobile drove up and MacLeod

opened the door of a garage attached to the rooming house and drove a truck out.

Car Goes In and Out

The automobile then was driven into the garage, and emerged a short time later with the trunk crammed with packages with the word "Kodak" on the side. The car drove away, and MacLeod drove the truck back into the garage.

Higgs said the automobile was driven by James I. Marshall, 29, a Ferndale, Mich., jeweler, who has pleaded guilty to possessing some of the stolen film. After Marshall entered his plea, he was shot and wounded, last Nov. 20.

With Marshall, Higgs said, was a man whom he later learned to be Albert Swartz, 43, also of Ferndale. Swartz was shot and killed near his home on May 17 after he had pleaded guilty to possessing the stolen film.

Radios Another Agent

As the automobile pulled away from the garage, Higgs testified, he flashed word, via his walkie talkie, to another FBI agent, Bruno W. Wilson, parked in an automobile nearby.

Wilson testified to following the car containing Marshall and Swartz to a point near Niles, Mich., where he lost it in traffic. Two other FBI agents, Norman S. Transeth and William A. Sullivan, testified to picking up the car a few miles west of Ann Arbor, Mich., and following it into Detroit. Next day they said they seized a quantity of stolen film in the basement of Marshall's jewelry store, and arrested both Marshall and Swartz.

The government rested at the conclusion of this testimony, and the court denied a motion for a directed verdict. Defense testimony will begin today.

Another Agent Testifies

Marshall has testified that he and Swartz obtained their film from Gordon and MacLeod.

Earlier, another FBI agent, William McCormick, told of a conversation he had last Nov. 8 with Gordon. McCormick quoted Gordon as saying "If I told you about everybody I'd sold stolen merchandise to in the city of Chicago it would involve a great many people."

George F. Callaghan, defense attorney, jumped up and asked for a mistrial, but his request was denied by Judge William J. Campbell.

The stolen film involved in the trial was part of a shipment from the Eastman Kodak company of Rochester, N. Y., to its Chicago branch.

STOLEN FILMS TRIAL SPEEDED TOWARD JURY

Two Chicago Defendants Deny Guilt on Stand

Closing arguments in the case of two men charged with possessing \$12,000 worth of stolen photographic film will be heard before Judge William J. Campbell in federal District court today, with the probability that the case may go to the jury by nightfall.

The defendants are Kenneth Gordon, 28, of 515 Roscoe st., and Kenneth MacLeod, 37, of 1150 Lake Shore dr. The defense rested late yesterday after both defendants denied on the witness stand that they ever possessed the stolen film.

FBI Agents Watch Operation

The government's case included testimony of a federal bureau of investigation agent who secreted himself in a washroom of the Popular Mechanics building and saw part of the stolen film taken from a garage attached to a rooming house operated by MacLeod at 215 E. Erie st., in an automobile containing two Michigan jewelers, Albert Swartz, 43, and James I. Marshall, 29.

The agents testified that Swartz and Marshall drove to the rooming house, that the automobile was loaded and driven away. Other FBI agents trailed the car to Detroit.

One Jeweler Assassinated

Swartz and Marshall were arrested in Michigan. Both pleaded guilty to possessing the film. Both said they obtained it from MacLeod and Gordon, and Marshall so testified at the present trial. A short time after Swartz pleaded guilty, he was mysteriously shot and killed near his Ferndale, Mich., home. Marshall was shot and wounded, but recovered.

On the stand yesterday, Gordon said that Swartz asked him last July to find a garage where he could put his truck. Gordon said he sent Swartz to MacLeod.

The stolen films, belonging to the Eastman Kodak company, were part of a shipment from Rochester, N. Y., to the company's Chicago branch.

1112 And on the same day to wit, the 6th day of June, 1951 there was filed in the Clerk's office of said Court a certain Transcript Of Radio Broadcast in words and figures following, to wit:

1113 Funeral services are being arranged today for a five-year-old daughter of a Detroit jeweler who was slain two weeks ago before he could testify in a Chicago theft-ring case.

Doctors say Irene Swartz died yesterday of a chronic respiratory ailment. But police say they'll make sure she wasn't another victim of gangland reprisals.

The girl's father, 43-year-old Albert, was killed in the garage of his home May 17th, and police blamed the slaying on Chicago gunmen. He was to have turned state's evidence in the Chicago trial of 28-year-old Kenneth Gordon and Kenneth MacLeod for Interstate theft of a 12-thousand dollar film shipment.

Swartz widow has two other children.

1114 And on the same day to wit, the 6th day of June, 1951 there were filed in the Clerk's office of said Court two certain Additional Instructions submitted by defendants MacLeod and Gordon, respectively, in words and figures following, to wit:

1115 It is the right and privilege of a person who is being subjected to questioning by an agent of the United States to maintain his silence and to refuse to answer questions and you are not to engage in any inference or consider that fact as bearing on the guilt of any defendant who has done so.

1116 The value of the property which must be determined by you under Counts 2 and 4 of this Indictment, is the market value at the time of the alleged theft, if you believe beyond a reasonable doubt that it was stolen. You must find beyond a reasonable doubt that the value of the merchandise described in Count 2 was in excess of \$5,000.00 before you can return a verdict of guilty on that Count. That applies also to Count 4 of the Indictment. If you find beyond a reasonable doubt that this property was stolen while in interstate commerce from the Eastman Kodak Company in Rochester, New York, to the Eastman Kodak Company in Chicago, Illinois, the value of this merchandise must be determined by you at its wholesale rather than its retail value.

1117 And on the same day to wit, on the 6th day of June, 1951, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell District Judge, appears the following entry, to wit:

1118

IN THE UNITED STATES DISTRICT COURT

(Caption—No. 50 CR 641)

This being the day to which this cause was continued for farther trial again comes the United States by the United States Attorney come also the defendants in their own proper persons and by their counsel and the Jury and Alternate Juror heretofore elected, empaneled and sworn herein for the trial of this cause also come and trial of this cause proceeds and at the close of all the evidence each defendant enters herein his motion for judgment of acquittal as to each count of the indictment separately which motions are entered and taken under advisement by the Court until after the return of the Jury's verdict and thereupon the Court rules on instructions submitted by counsel and the final arguments of counsel having been heard and concluded and the hour of adjournment having arrived it is

Ordered that the Jury and Alternate Juror be permitted to separate until 10 o'clock A.M. June 7, 1951.

1122 And on the same day to wit, on the 8th day of June, 1951, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell District Judge, appears the followings entry, to wit:

1123

IN THE UNITED STATES DISTRICT COURT

(Caption—No. 50 CR 641)

This day again comes the United States by the United States Attorney came also the defendants Kenneth C. Gordon and Kenneth J. MacLeod in their own proper persons

and by their counsel and the Jury heretofore elected, empaneled and sworn herein for the trial of this cause also come and render their verdicts and upon their oath do say:

"We, the Jury, find the defendant, Kenneth J. MacLeod guilty as charged in the Indictment."

"We, the Jury, find the defendant, Kenneth C. Gordon guilty as charged in the Indictment."

and it is

Ordered that the defendants' motion for judgment of acquittal heretofore entered herein and their motions for a new trial be and the same are hereby set for hearing on June 15, 1951 at 2 o'clock P.M. and it is

Further Ordered that the defendants be and they are hereby released on their present bonds until disposition of said motions, said bonds to remain in full force and effect.

1124 And afterwards, to wit, on the 19th day of June, 1951, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell District Judge, appears the following three entries, to wit:

1125

JUDGMENT AND COMMITMENT.

² Criminal ¹ Indictment.

-On this 19th day of June, 1951, came the United States Attorney, and the defendant Kenneth J. MacLeod appearing in proper person, and ² by counsel and,

The defendant having been convicted on ³ a verdict of guilty of the offense charged in the ¹ Indictment in the above-entitled cause, to wit:⁴

Unlawfully having in possession certain goods and chattels previously moving as part of an interstate shipment and knowing the same to have been stolen; transporting and causing to be transported in interstate commerce stolen merchandise

and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized repre-

representative for imprisonment for the period of ⁵ Ten (10) Years, or until said defendant is otherwise discharged as provided by law.⁶

It Is Further Ordered that ⁷ on motion of the defendant the execution of said sentence is stayed until noon, June 26, 1951. Surety on the bond having consented thereto, defendant's bond will stand in full force and effect.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.⁸

(Signed) William J. Campbell
United States District Judge.

The Court recommends commitment to ⁹

A True Copy. Certified this _____ day of _____
(Signed) _____ (By) _____
Clerk. Deputy Clerk.

1126

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 50 CR 641) • •

JUDGMENT AND COMMITMENT.

Criminal ¹ Indictment.

On this 19th day of June, 1951, came the United States Attorney, and the defendant Kenneth C. Gordon appearing in proper person, and ² by counsel and,

The defendant having been convicted on ³ a verdict of

¹Indictment or information. ²Insert (a) "by counsel" or (b) "having been advised of his constitutional right to counsel and having been asked whether he desired counsel assigned by the Court, replied that he did not," whichever is applicable. ³Insert the words, "his plea of guilty," "plea of nolo contendere," or "verdict of guilty," as the case may be. ⁴Name specific offense or offenses and specify counts upon which convicted. ⁵Insert sentence and any provision for payment of fine and state whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin; that is, with reference to termination of preceding term, or with respect to any other outstanding or unserved sentence. ⁶Strike out if Court did not so order. ⁷Indicate any order with respect to suspension and probation. ⁸Certified copy to accompany defendant to institution. ⁹For use of Court wishing to recommend a particular institution.

guilty of the offense charged in the ¹ Indictment in the above-entitled cause, to wit:⁴

Unlawfully having in possession certain goods and chattels previously moving as part of an interstate shipment and knowing the same to have been stolen; transporting and causing to be transported in interstate commerce stolen merchandise

and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of ⁵ Ten (10) Years, or until said defendant is otherwise discharged as provided by law.⁶

It Is Further Ordered that ⁷ on motion of the defendant the execution of said sentence is stayed until noon, June 26, 1951. Surety on the bond having consented thereto, defendant's bond will stand in full force and effect.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.⁸

(Signed) William J. Campbell
United States District Judge.

The Court recommends commitment to ⁹

A True Copy. Certified this _____ day of _____
(Signed) _____ (By) _____

Clerk. Deputy Clerk.

¹Indictment or information. ²Insert (a) "by counsel" or (b) "having been advised of his constitutional right to counsel and having been asked whether he desired counsel assigned by the Court, replied that he did not," whichever is applicable. ³Insert the words "his plea of guilty," "plea of nolo contendere," or "verdict of guilty," as the case may be. ⁴Name specific offense or offenses and specify counts upon which convicted. ⁵Insert sentence and any provision for payment of fine and state whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin; that is, with reference to termination of preceding term, or with respect to any other outstanding or unserved sentence. ⁶Strike out if Court did not so order. ⁷Indicate any order with respect to suspension and probation. ⁸Certified copy to accompany defendant to institution. ⁹For use of Court wishing to recommend a particular institution.

1127

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 50 CR 641) • •

This cause coming on for hearing on the motions of the defendants for judgment of acquittal and motions for a new trial comes the United States by the United States Attorney come also the defendants Kenneth C. Gordon and Kenneth J. MacLeod in their own proper persons and by their counsel and the Court having heard the arguments of counsel and being fully advised in the premises it is

ORDERED that the motions of each defendant for judgment of acquittal and for a new trial be and the same are each and all denied.

1128 And on, the same day to wit, the 19th day of July, 1951 there were filed in the Clerk's office of said Court two certain Transcripts Of Proceedings Had June 22, 1951, Before The Honorable William J. Campbell, Judge; in words and figures following, to wit:

1154

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 50 CR 641) • •

TRANSCRIPT OF PROCEEDINGS

had at a hearing before the Honorable William J. Campbell, one of the Judges of said Court, in his Chambers, U. S. Court House, Chicago, Illinois, on Friday, June 22, 1951, at 11:45 o'clock, a.m.

Present:

Honorable Otto Kerner, Jr.,
U. S. District Attorney,

By: Robert J. Downing,
Assistant U. S. Attorney,

On behalf of Government;

Mr. George F. Callaghan,
On behalf of Defendant Gordon;

Mr. Maurice J. Walsh,
On behalf of Defendant MacLeod.

1155 The Court: Go on.

Mr. Walsh: Your Honor, this is the situation, that has developed. We have been formed that after the jury retires, your Honor sends the ordinary instructions to the jury.

The Court: That is correct.

Mr. Walsh: And after they have been written up by the Court Reporter.

The Court: That is right.

Mr. Walsh: As an actual matter of fact, I was not aware of that. The record did not show that as far as I know that they went to the jury in writing.

The Court: We can have the record so show.

Mr. Walsh: That is your Honor's custom?

The Court: Always, both civil and criminal cases.

Mr. Walsh: I might say that it is not the custom in all the courts in the building.

The Court: Some do and some do not. I always do.

Mr. Walsh: The Allen instruction was given at about 10:30 in the evening after the jury had retired at 11:00 o'clock, and in the colloquy before it was given, as I understood your Honor, and I think the record will
1156 show, although I do not have it with me, that your Honor stated: "This is what they will get. I will read this to them. That will be the end."

The Court: Word for word as it was in the copy that was shown you.

Mr. Walsh: Yes.

The Court: That is right.

Mr. Walsh: You did read the Allen instruction. What we are concerned about is whether or not, or what we desire to know is whether or not the written instruction went to the jury later and whether it went to them at their request or in the ordinary course of sending it to them.

The Court: You are entitled to know that. I will give you that information now on the record.

Following my usual instruction after I gave the first charge to the jury at 11:00 in the morning, just before they retired, the official reporter wrote up the charge to the jury. I checked it and found it accurate in connection with my notes and I think it was finished around 3 o'clock.

Mr. Callaghan: In the afternoon?

The Court: Three p.m. The court reporter finished the transcript of the charge as given at 11 a.m. 1157 and I gave it to the Marshal to bring into the jury room and that was done.

At 10:30 p.m. the same evening, the jury being in disagreement and having so advised the Marshal, I called counsel into Chambers and advised them of that, showed counsel the charge in the Allen case that I intended to then give to the jury. I called the jury back into the box in the presence of counsel, and then delivered that charge in the Allen case, as the record will show.

At 11:30 p.m. the same evening, the foreman of the jury rapped on the jury room door, and asked the Marshal if they could have a copy of the charge that the Court had just given at 10:30 p.m. I gave the Marshal the typewritten copy from which I had read.

Mr. Callaghan: Was your Honor still here when that was done?

The Court: Yes, I was here in Chambers. I gave the typewritten copy which I had read verbatim to the jury to the Marshal to deliver to the foreman. The Marshal went immediately from my Chambers to the jury room with the typewritten copy that I had given him and delivered it to the jury.

Does that answer your question?

1158 Mr. Walsh: Yes, Your Honor.

Mr. Callaghan: Has your Honor the typewritten copy?

The Court: It is right here. Do you want it?

Mr. Callaghan: I would like to examine it.

The Court: Wait a minute. Except that we have pasted back on the citation on the bottom of it, which I had torn off when it went to the jury. This much where you see was torn off.

Mr. Callaghan: Yes.

The Court: That went to the jury. This was not on, the citation at the bottom.

Mr. Callaghan: Yes.

The Court: Exactly what I had read there went to the jury.

Mr. Callaghan: The only reason I ask this, Judge, is this: I know that you frequently take our tendered instructions and the Government's tendered instructions and you will paraphrase them, take out parts, and so on. I wanted to be sure that is the actual copy that went to the jury.

The Court: That is it right there.

Mr. Callaghan: May the Court Reporter now make a copy of this to show this was the actual document 1159 that did go to the jury?

The Court: Certainly.

Mr. Callaghan: Not the citation of this part on the bottom. That was not included.

The Court: We tore it off; pasted it back on later, so that I can keep it in my file. This part here was torn off. The citation was torn off and this is what went to the jury and you may now copy this into your record.

Mr. Callaghan: Thank you.

The Court: When you finish, return it to me.

(The following is a copy of the instruction referred to above:)

"The mode provided by our Constitution and laws for deciding questions of fact in cases such as this is by verdict of a jury. In a large proportion of cases and perhaps, strictly speaking, in all cases, absolute certainty cannot be attained or expected. Although the verdict to which each juror agrees must of course be his own verdict, the result of his own convictions, 1160 and not a mere acquiescence in the conclusions of his fellows, yet in order to bring 12 minds to a unanimous result, you must examine any questions submitted to you with candor and with a proper regard and deference to the opinions of others. You should consider that the case must at some time be decided; that you were selected in the same manner and from the same source from which any future jury must come, and there is no reason to suppose that the case will ever be submitted to 12 men and women more intelligent, more

impartial or more competent to decide it, nor that more or clearer evidence will be produced on the one side or the other.

“With this in view it is your duty to decide the case, if you can conscientiously do so. In order to make it more practicable the law imposes the burden of proof on one party or the other in all cases. In the present case the burden is upon the Government to establish the guilt of the defendants beyond a reasonable doubt, and if you are left in doubt as to the guilt of the defendant, the defendant is entitled to the benefit of 1161 that doubt, and must be acquitted. But in conferring together you ought to pay proper respect to each other's opinions and reasons with a disposition to be convinced with each other's arguments, and on the one hand if much the larger number of you are for a conviction, the dissenting jurors should consider whether the doubt in their own minds is a reasonable one which makes no impression upon the minds of so many men and women equally honest, equally intelligent, and who have heard the same evidence with the same attention, and with an equal desire to arrive at the truth and under the sanction of the same oath. And, on the other hand, if the majority of you are for acquittal the minority should equally ask themselves whether they may not reasonably and ought not to doubt the correctness of the judgment which is not concurred in by a number of those with whom they are associated, and distrust the weight or sufficiency of that evidence which fails to carry conviction in the minds of their fellows.”

1162 The Court: Have you anything to say?

Mr. Downing: No, your Honor, not a thing. I think the instructions going to the jury is in keeping with what has been done.

The Court: It follows my standard procedure.

Mr. Downing: I think so, too, in the other Courts of the building.

Mr. Callaghan: I would like to say for the record that we were not advised that the charge was going to the jury, either of the charges, either the first charge or the Allen charge, and that both of those charges were sent to the jury out of the presence of the defendants.

Mr. Walsh: Or either counsel.

The Court: That is also following the usual procedure and I think you knew of it in other cases. I mean it is in standard policy.

Mr. Callaghan: I never knew that.

The Court: You have tried enough cases here to know. It is a standard policy to send the charge in both civil and criminal cases to the jury.

Mr. Downing: It is my experience in practicing here three and a half years.

1163 The Court: This is the only District I know of where some of the Judges do not.

Mr. Walsh: I should like to take an exception to the sending of the Allen supplemental instruction by the Court to the jury.

The Court: You mean the Allen charge?

Mr. Walsh: To the jury, in writing, at their request, out of the presence of the defendants and their counsel, and the Government's counsel, for that matter, too.

Mr. Callaghan: I join in that.

The Court: The objections may be noted and are overruled.

(Which were all of the proceedings had at the hearing of the above entitled case.)

1164

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 50 CR 641) • •

C E R T I F I C A T E

I hereby certify that the above and foregoing is a full, true and accurate transcript of my original shorthand notes taken upon the hearing of the above-entitled cause.

Paul A. Ruhe,

Paul A. Ruhe,
Official Court Reporter,
United States District Court,
Northern District of Illinois.

June 22, 1951.

1165 And afterwards on, to wit, the 22nd day of June, 1951 came the Defendants, Kenneth C. Gordon and Kenneth J. MacLeod, by their attorneys and filed in the Clerk's office of said Court their certain Notice Of Appeal, in words and figures following, to wit:

1166

IN THE UNITED STATES DISTRICT COURT

• • • (Caption—No. 50 CR 641) • •

NOTICE OF APPEAL

Name and address of Appellants:

Kenneth C. Gordon,
515 W. Roscoe Street,
Chicago, Illinois.
Kenneth J. MacLeod,
1150 N. Lake Shore Drive,
Chicago, Illinois.

Name and address of Appellants' Attorneys:

George F. Callaghan,
105 West Adams Street,
Chicago, Illinois.
Attorney for Kenneth C. Gordon
Maurice J. Walsh,
29 South La Salle Street,
Chicago, Illinois.

Attorney for Kenneth J. MacLeod

Offense: Possession of goods stolen from interstate commerce knowing the same to have been stolen (Violation of Section 659, Title 18); knowingly transporting in interstate commerce goods theretofore stolen at a value in excess of \$5,000.00 (Violation of Section 2314, Title 18, United States Code).

Concise statement of judgment or order, giving date, and any sentence:

Judgment entered June 19, 1951.

Each of the defendants sentenced to the custody of the Attorney General for a period of ten (10) years;

General for a period of ten (10) years;

Certificate of Mailing

Name of institution where now confirmed, if not on bail:
 Defendants at liberty on bail in the amount of
 \$2500.00 pursuant to stay of execution which ex-
 pires June 26, 1951.

We, the above-named Appellants, hereby appeal to the
 United States Court of Appeals for the Seventh Circuit
 from the above-stated judgment.

Dated: June 22, 1951.

George F. Callaghan

Maurice J. Walsh

Appellants Attorneys.

(Certificate of Mailing Attached Hereto):

1167

IN THE UNITED STATES DISTRICT COURT

• • • (Caption—No. 50 CR 641) • •

CERTIFICATE OF MAILING

I, Roy H. Johnson, Clerk of the United States District
 Court in and for the Northern District of Illinois, do hereby
 certify that on June 22, 1951, in accordance with Rule 73(b)
 of the Federal Rules of Civil Procedure, a copy of the
 foregoing Notice of Appeal was mailed to:

Honorable Otto Kerner, Jr., U. S. Atty.

450 U. S. Court House

Chicago 4, Illinois

and

Hon. Kenneth J. Carrick, Clerk

U. S. Court Of Appeals, Seventh Circuit

1212 Lake Shore Drive

Chicago 10, Illinois

In Testimony Whereof, I have hereunto subscribed
 my name and affixed the seal of the aforesaid
 Court at Chicago, Illinois, this 22nd day of June,
 1951.

(Seal)

Roy H. Johnson,

Clerk

By Gizella Butcher

Deputy Clerk

1168 And on, to wit, the 2nd day of July, 1951 came the Defendants by their attorneys and filed in the Clerk's office of said Court their certain Designation Of Record in words and figures following, to wit:

1169

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 50 CR.641) • •

DESIGNATION OF RECORD.

To:

Clerk of the United States District Court
Northern District of Illinois
Eastern Division

You are hereby requested on behalf of the Defendants herein, Kenneth C. Gordon and Kenneth J. MacLeod, to make a transcript of the record to be filed in the United States Court of Appeals for the Seventh Circuit pursuant to the appeal taken in the above entitled cause, and to include in said transcript of record the following:

1. Placita.
2. Statement in accordance with Rule 10 (b) of Court of Appeals Rules.
3. Indictment.
4. Motion to dismiss Indictment and Order denying same.
5. Pleas of "not guilty" by Defendants.
6. Order entered May 14, 1951; setting cause for trial on June 11, 1951, before Judge Michael L. Igoe.
7. Petition by Government to increase bail, re-assign cause and advance for trial, and Order of Judge Igoe thereon.
8. Petition of Defendants for continuance and Order of Judge Igoe thereon.
9. Order of Executive Committee re-assigning cause to Judge William J. Campbell and advancing cause for trial on May 28, 1951.
10. Order of Judge Campbell on Defendants' motion for continuance.
11. Motion for Bill of Particulars and Order thereon.
12. Government's response to motion for Bill of Particulars.

1170 13. Transcript of all proceedings beginning at Monday, May 28, 1951, at 2:00 P.M., to and inclusive of proceedings had on Friday, June 22, 1951, and all exhibits received in evidence.

14. Motions for mistrial during course of trial and Orders thereon.

15. Motions of Defendants for judgment of acquittal at close of Government's evidence and at close of all evidence, and Orders thereon.

15a. Verdict.

16. Refused instructions, tendered by the Defendants.

17. Motions for judgment of acquittal notwithstanding verdict and Order of Court thereon.

18. Judgment on verdict and sentence.

19. Notice of Appeal.

20. Designation of Record.

21. Such Orders as may be entered in connection with the preparation of this record and exhibits and transmittal thereof.

The said transcript is to be prepared as required by law and the rules of this Court and the Federal Rules of criminal procedure and is to be filed in the Office of the Clerk of the United States Court of Appeals for the Seventh Circuit at 1212 Lake Shore Drive, Chicago, Illinois, within the time provided by law, or extensions thereof as granted by Order of Court.

George F. Callaghan

George F. Callaghan, Attorney for
Kenneth C. Gordon

Maurice J. Walsh

Maurice J. Walsh, Attorney for
Kenneth J. MacLeod

Received a copy of this Designation
this 2nd day of July, 1951.

Otto Kerner, Jr.

United States Attorney

1171 And afterwards on, to wit, the 6th day of July, 1951
came the Appellee by its attorneys and filed in the
Clerk's office of said Court its certain Notice in words and
figures following, to wit:

1172

IN THE UNITED STATES DISTRICT COURT \

• • (Caption—No. 50 CR 641) • •

NOTICE.

To the Clerk of the Court:

In connection with the appeal in the above captioned
matter, please be advised that pursuant to Rule 10(c) of
the Rules of the United States Court of Appeals for the
Seventh Circuit, the following information is herewith sub-
mitted:

Appellee:

United States of America

Appellee's

Otto Kerner, Jr.

Attorneys:

United States Attorney

Robert J. Downing

Assistant U. S. Attorney

Otto Kerner, Jr.

Otto Kerner, Jr.

United States Attorney

480 *Appellee's Additional Designation of Record*

1173 And on the same day, to wit, the 6th day of July, 1951 came the Appellee by its attorneys and filed in the Clerk's office of said Court its certain Additional Designation Of Record To Be Incorporated In Record On Appeal in words and figures following, to wit:

1174

IN THE UNITED STATES DISTRICT COURT

• • • (Caption—No. 50 CR 641) • • •

APPELLEE'S ADDITIONAL DESIGNATION OF RECORD TO BE INCORPORATED IN RECORD ON APPEAL.

To the Clerk of the Court:

The defendants-appellants have heretofore filed with this Court a Designation of Record to be contained in the record on the instant appeal.

Pursuant to Rules 75(a) and 75(d) of the Federal Rules of Civil Procedure and upon the failure of the defendants-appellants to designate the complete record and all the proceedings and evidence in the said cause, and upon the failure, to date, of the defendants-appellants to designate a concise statement of the points on which they intend to rely on the said appeal, the Plaintiff-Appellee hereby respectfully requests the additional portion of the record, as hereinbelow set forth, be contained in the record on appeal:

1. Complete transcript of the entire proceedings before Judge William J. Campbell, on Monday, May 28, 1951, so as to cover the complete examination of the jury panel.
2. Government's Exhibits 1 through 73, 75 through 88, 90 and 91, 93 through 98.
3. The entire instructions offered by each Defendants-Appellants, Kenneth C. Gordon and Kenneth J. MacLeod.

United States of America
By Otto Kerner, Jr.
Otto Kerner, Jr.
United States Attorney

1175. And afterwards, to wit, on the 27th day of July, 1951, being one of the days of the regular July term of said court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe District Judge, appears the following entry, to wit:

1176

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 50 CR 641) • •

On motion of the defendants Kenneth C. Gordon and Kenneth J. MacLeod by their counsel and upon consent of the United States Attorney it is

ORDERED that the time of said defendants within which to file Transcript of Record in the United States Court of Appeals for the Seventh Circuit be and the same is hereby extended to September 5, 1951

1177 And afterwards on, to wit, the 1st day of August, 1951 came the Parties by their attorneys and filed in the Clerk's office of said Court their certain Stipulation in words and figures following, to wit:

1178

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 50 CR 641) • •

STIPULATION.

It Is Hereby Stipulated by and between Kenneth O. Gordon and Kenneth J. MacLeod, and the United States of America, by their respective attorneys, that the Transcript of Proceedings shall include therein a statement as follows:

That counsel for the parties examined the prospective jurors on their voir dire and each of the prospective jurors, including those who were accepted and sworn to try the issue, were asked the following questions:

1. Have you read or heard anything concerning the case to be tried or the parties involved?
2. Has any matter come to your attention which would prejudice you for or against any party or which would be considered by you in determining your verdict?

Stipulation

3. If any newspaper article or other publication occurring during the trial should come to your attention, would you permit it to affect your verdict, or would you consider such in any manner for or against any party to this proceeding?

That each juror, including those who were sworn to try the issue, answered the foregoing questions in the negative.

1179 That each of the parties to the proceeding accepted a jury to try the issue, the defendants and their counsel not having exhausted the peremptory challenges allowed them by law, or allowed to them by the trial judge.

It Is Agreed that the statement referred to above may be included in the Transcript of Proceedings, as contained in the Transcript of Record on appeal at the beginning of the Transcript of Proceedings.

Otto Kerner, Jr.

United States Attorney

Maurice J. Walsh

Maurice J. Walsh, Attorney for
Kenneth J. MacLeod

George F. Callaghan

George F. Callaghan, Attorney for
Kenneth C. Gordon

Dated:

1180 And afterwards on, to wit, the 4th day of September, 1951 came the Parties by their attorneys and filed in the Clerk's office of said Court their certain Stipulation in words and figures following, to wit:

1181

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 50 CR 641) • •

STIPULATION

It Is Hereby Stipulated by and between Kenneth C. Gordon and Kenneth J. MacLeod and the United States Of America, by their respective attorneys that in connection with the filing of the record in the instant appeal the following description of Government Exhibits 1 through 65 in evidence may be substituted in the said record in lieu

of the actual physical exhibits bearing the same number, all of which exhibits were a portion of the exhibits introduced into evidence by the United States of America in the trial of the instant cause:

Government
Exhibit No.

Description

1. One full carton containing 50 Rolls (in boxes) 100 feet (each) 16 mm Kodachrome Commercial Safety Color Motion Picture Film each box containing thereon Emulsion Number 5268-176-0515. The carton bears the following printing on the outside thereof:
 - (on one end) 50 Rolls, 100 feet, 16 mm Kodachrome Commercial.
5268-176-0515 CC10M Cine-Kodak Safety Film.
 - (on one side) Word "KODAK" printed in large yellow letters on a black background. The printed number "356".
 - (on one side) Word "KODAK" printed in large yellow letters on a black background.
 - (on the top) The printing "Eastman Kodak Co." c/o J. E. Brulator, Inc., 1727 Indiana Ave., Chicago 16, Illinois.
 - (on other end) Initial in ink "WAS" and "HAS".
2. One empty carton with the following printing on the outside thereof:
 - (on one end) 50 Rolls 100 feet 16 MM Kodachrome Commercial.
5268-176-0515 CC10M
Cine-Kodak Safety Film
 - (on other end) Initials in ink "WAS" and "HAS"
 - (on one side) Word "Kodak" printed in large yellow letters on a black background. The printed number "355".
 - (on other side) Word "KODAK" printed in large yellow letters on a black background.

Stipulation

- (on the top) The printing "Eastman Kodak Co." c/o J. E. Brulator, Inc., 1727 Indiana Ave., Chicago 16, Illinois.
3. One empty carton, same as Government Exhibit No. 2 above except the printed number on side of carton is "357".
 4. One empty carton, same as Government Exhibit No. 2 above except the printed number on side of carton is "358".
 5. One empty carton, same as Government Exhibit No. 2 above except the printed number on side of carton is "360".
 - 6-7-8. Three empty cartons with the following printing on the outside of each thereof:
 - (on one end) 300 Rolls Kodak Film 116 Verichrome, Dec. 1951. Made in Rochester, N.Y. U.S.A. By Eastman Kodak Co. Trade Mark Reg. U.S. Patent Office.
 - (on other end) Initials in ink "AS" and "HAS".
 - (on both sides) Word "KODAK" printed in large yellow letters on a black background.
 9. One empty carton, same as Government Exhibits 6-7-8 above except the initials in ink on one end are "RCM".
 - 10 through 16. Seven empty cartons, same as Government Exhibits 6-7-8 above.
 - 17 through 23. Seven empty cartons with the following printing on the outside of each thereof:
 - (on one end) 100 Rolls 25 Feet 8 mm Kodachrome. Cine-Kodak Safety Film For Cine-Kodak eight Camera. Oct. 1951 Made in Rochester, N.Y. U.S.A. By Eastman Kodak Co. Trade Mark Reg. U.S. Patent Office.
 - (on other end) In ink name "Leo C. Shirley".
 - (on both sides) Word "KODAK" printed in large yellow letters on a black background.
 - 24 & 25. Two empty cartons, same as Government Exhibits 17 through 23 except initials in ink on one end of "WAS" and "HAS".

26. One empty carton, same as Government Exhibits 17 through 23 except initials in ink on one end are "RCM".
- 27 through 43. 17 empty cartons, same as Government Exhibits 17 through 23 except initials in ink on one end of "WAS" and "HAS".
44. One empty carton, same as Government Exhibits 17 through 23 except initials in ink on one end are "RCM".
- 45 through 52. 8 empty cartons, same as Government Exhibits 17 through 23 except initials in ink on one end are "WAS" and "HAS".
53. One empty carton, same as Government Exhibits 17 through 23 except initials in ink on one end are "HEBS".
- 54 through 57. 4 full cartons—not opened—with the following printing on the outside of each thereof:
(on one end) 100 Rolls 25 Feet 8mm Kodachrome.
Cine-Kodak Safety Film For Cine-Kodak Eight Camera Oct. 1951. Made in Rochester, N.Y. U.S.A. By Eastman Kodak Co. Trade Mark Reg. U.S. Patent Office.
(on other end) In ink initials "HEBS" and "Al Swartz"
(on both sides) Word "KODAK" printed in large yellow letters on a black background.
58. One full carton open—less—7 rolls—with the same description as Government Exhibits 54 through 57..
- 59 & 60. 2 full cartons—not opened—same as Government Exhibits 54 through 57.
61. One full carton—not opened—same as Government Exhibits 54 through 57 except no ink initial "AL SWARTZ".
- 62 & 63. 2 full cartons—not opened—same as Government Exhibits 54 and 57.
64. One carton containing 100 rolls 116 Kodak Film Verichrome with the following printing on the outside of the carton:
(on one end) 300 Rolls Kodak Film 116° Verichrome. Dec. 1951. Made in Rochest-

er, N.Y. U.S.A. By Eastman Kodak Co.
Trade Mark Reg. U.S. Patent Office.

(on other end) In ink initials "HEBS"
and "AL SWARTZ".

(on both sides) Word "KODAK" printed
in large yellow letters on a black back-
ground.

65. One empty carton, same as Government Ex-
hibit 2 above except:

(on one side) the printed number is
"359".

(on one end) the initials in ink are "HE
BS" and "AL SWARTZ".

Otto Kerner, Jr.

United States Attorney

George F. Callaghan

George F. Callaghan

Attorney for Kenneth C. Gordon.

Maurice J. Walsh

Maurice J. Walsh

Attorney for Kenneth J. MacLeod.

1185 And afterwards, to wit, on the 5th day of Septem-
ber, 1951, being one of the days of the regular Septem-
ber term of said Court, in the record of proceedings there-
of, in said entitled cause, before the Honorable William J.
Campbell District Judge, appears the following entry, to
wit:

1186

IN THE UNITED STATES DISTRICT COURT

(Caption—No. 50 CR 641)

O R D E R

This cause having come on to be heard on motion of the
attorneys for the Defendant-Appellants, and it appearing
that there are a substantial number of exhibits which are
not set forth in the transcript of evidence, and that the
purposes of the Court and of the parties can be best served
by inspection of the original exhibits;

It Is Therefore Ordered, Adjudged and Decreed that the original exhibits introduced on the trial of this cause, other than Government Exhibits 1 through 65, inclusive, be listed by the Clerk of the United States District Court, and that said list and exhibits in their original form be transmitted to the Clerk of the United States Court of Appeals for the Seventh Circuit, under the certificate and seal of the Clerk of the District Court, with the record on appeal in this cause.

Enter,

Campbell
Judge

Date September 5, 1951

1187, United States of America,
Northern District of Illinois

ss.

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with the Designations and Stipulations of the parties herein filed in this Court in the cause entitled: United States Of America, Plaintiff, vs. Kenneth C. Gordon and Kenneth J. MacLeod, Defendants, No. 50 CR 641, as the same appear from the original records and files thereof now remaining among the records of the said Court in my office, except the original exhibits which are incorporated herein by direction of this Court.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 5th day of September, 1951.

Seal

Roy H. Johnson

Clerk

By Gizella Butcher

Deputy Clerk

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed transcript of record, filed December 1, 1951, in:

Cause No. 10439.

United States of America,

Plaintiff-Appellee,

vs:

Kenneth C. Gordon and Kenneth J. MacLeod/

Defendants-Appellants,

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 30th day of June, A. D. 1952.

(Seal)

Kenneth J. Carrick,
*Clerk of the United States Court of
Appeals for the Seventh Circuit.*

At a regular term of the United States Court of Appeals for the Seventh Circuit, held in the City of Chicago and begun on the third day of October, in the year of our Lord one thousand nine hundred and fifty, and of our Independence the one hundred and seventy-fifth:

10439 United States of America, <i>Plaintiff-Appellee,</i> <i>vs.</i> Kenneth C. Gordon and Kenneth J. MacLeod, <i>Defendants-Appellants.</i>	}	Appeal from the United States Dis- trict Court for the Northern District of Illinois, East- ern Division.
---	---	--

And, afterwards, to-wit, on the twenty-second day of June, 1951, there was filed in the office of the Clerk of this Court an Appearance of counsel for the appellants, which said Appearance is in the words and figures following, to-wit:

UNITED STATES COURT OF APPEALS
 For the Seventh Circuit,
 Chicago 10, Illinois.

Cause No. 10439.

United States of America,
Plaintiff-Appellee,
vs.

Kenneth C. Gordon and Kenneth J. MacLeod,
Defendants-Appellants.

The Clerk will enter our appearance as counsel for Defendants-Appellants.

George F. Callaghan,
 105 West Adams Street,
 Chicago, Illinois,
 Maurice J. Walsh,
 29 South LaSalle Street,
 Chicago, Illinois.

Endorsed: Filed June 22, 1951. Kenneth J. Carrick,
 Clerk.

And afterwards, to-wit, on the twentieth day of February, 1952, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois.

Wednesday, February 20, 1952.

Before:

Hon. J. Earl Major, Chief Judge,
Hon. F. Ryan Duffy, Circuit Judge,
Hon. Walter C. Lindley, Circuit Judge.

United States of America,
Plaintiff-Appellee,
10439 vs.
Kenneth C. Gordon and Kenneth
J. MacLeod,
Defendants-Appellants.

Appeal from the
United States Dis-
trict Court for the
Northern District
of Illinois, East-
ern Division.

Now this day come the parties by their counsel and this cause comes on to be heard on the transcript of record and briefs of counsel and on oral argument by Mr. George F. Callaghan, counsel for appellant, Kenneth C. Gordon, and Mr. Maurice J. Walsh, counsel for appellant, Kenneth J. MacLeod, and by Mr. Richard E. Gorman, counsel for the appellee, and the Court takes this matter under advisement.

And afterwards, to-wit, on the fourteenth day of May, 1952, there was filed in the office of the Clerk of this Court the opinion of the Court, which said opinion is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS.

For the Seventh Circuit.

No. 10439. October Term, 1951, January Session, 1952.

United States of America,	} Appeal from the	
<i>Plaintiff-Appellee,</i>		
<i>vs.</i>		
Kenneth C. Gordon and Kenneth		
J. MacLeod,	} United States Dis-	
<i>Defendants-Appellants.</i>		trict Court for the
		Northern District
		of Illinois, East-
		ern Division.

May 14, 1952.

Before MAJOR, Chief Judge DUFFY and LINDLEY, Circuit Judges.

LINDLEY, Circuit Judge. Defendants were indicted on four counts, I and III of which averred their unlawful possession of goods stolen while in interstate commerce, in violation of 18 U. S. C. 659, and II and IV, that they caused the property mentioned in I and III to be transported further in interstate commerce in violation of 18 U. S. C. 2314. The jury found both defendants guilty, whereupon judgment entered, imposing upon each a sentence of ten years. This appeal followed.

Defendants assert that, (1), counts I and III are insufficient in law; (2), the proof is insufficient to support the verdict; (3), a fatal variance exists between the proof and the indictment; (4), defendants were unduly limited in cross-examination; and (5), the court erred in charging the jury.

We deem it unnecessary to comment at length on the proof adduced in support of the convictions. It is sufficient to say that, viewing the evidence, as this court must, in the

light most favorable to the government, the jury was completely justified in returning the verdicts, and all motions challenging the sufficiency of the proof and its alleged variance with the indictment were properly overruled. Also, assuming *arguendo* that counts I and III were defective in that they failed to allege the value of the goods unlawfully possessed, the conviction and resultant judgment should still stand, absent prejudicial error, for the verdict and sentences, being general, are supported by counts II and IV. *Claassen v. United States*, 142 U. S. 140, 147; *Evans v. United States*, 153 U. S. 608; *Hirabayashi v. United States*, 320 U. S. 81, 85; *De Jianne v. United States*, 282 Fed. 737 (CA-3).

Among the salient essential facts are the following. On July 10, 1950 a large quantity of camera film was stolen from an interstate shipment which had, as its origin, Rochester, New York and, as its destination, Chicago, Illinois. On July 20 and 27, 1950, in Chicago, certain portions of the film were observed in the possession of Gordon and MacLeod, being loaded into an automobile owned by James I. Marshall of Michigan. This man, accompanied by one Swartz, now deceased, then drove the car, loaded with film, from Chicago to Detroit. There a part of the merchandise was disposed of; the balance was eventually recovered. All four were charged with participation in the criminal undertaking. Marshall waived indictment and, on August 14, 1950, entered a plea of guilty to an information before the District Court in Detroit. Swartz and the two appellants were jointly indicted in the Northern District of Illinois. Later the charges against the deceased Swartz were dismissed.

Appellants' primary contention is that of alleged undue limitation imposed on their cross-examination of Marshall. While other proof tending to establish guilt of defendants was introduced, there can be no doubt that Marshall, an admitted accomplice, was an important witness. His testimony unequivocally established possession of the stolen film in Gordon on July 20 and in MacLeod on July 27, for he testified that on those dates the two defendants directed him and Swartz to the location of the stolen property and assisted in loading it into his automobile, which he then drove from Chicago to Detroit. Marshall was peculiarly the character of witness requiring the exercise of the most extended freedom of the right of cross-examination. *Greenbaum v. United States*, 80 F. 2d 113 (CA-9).

The trial court recognized this and extended extreme liberality to defendants in their efforts to weaken the witness' story. They were allowed to indulge in the all exploratory cross-examination suggested in *Alford v. United States*, 282 U. S. 687. However, in the course of the cross-examination, defendants elicited from Marshall, the information that, following his arrest by agents of the Federal Bureau of Investigation on July 28, 1950, he had made a statement concerning the details of the crime, in which he admitted he had in no way implicated either defendant. Furthermore, he admitted having later made four or five additional statements to the F. B. I. between that date and August 25, 1950. These statements varied from each other, he said, in some degree, and it was not until the last one, on August 25, that he, as he testified, in any way connected defendants with the undertaking. Upon evoking this information, defendants asked the court to "compel the government to produce that statement" (referring to the first one,) and "for the production of these statements," (referring to all of them). The court denied the requests.

The argument concerning this action upon the part of the trial court gives rise to several questions: Did the defendants take proper steps to bring about production of the evidence; does Rule 17(c) of the Federal Rules providing for the issuance of a subpoena duces tecum exclude other methods of securing production of documents; if the procedure adopted by defendants was proper, was it within the discretion of the trial court in such a situation as is presented here to refuse to order production of such documents, and certain subsidiary questions.

Rule 17(c) providing for a subpoena duces tecum does not of itself answer any of these inquiries, for it does not in so many words exclude other procedure. Rule 26 admonishes us to proceed in accord with the principles of the common law, in the light of reason and experience. Some federal courts have held that when production of pertinent documents in the possession of the United States Attorney is requested, it is the duty of the court to compel the production. Examples are *Boehm v. United States*, 123 F. 2d 791 (CA-8) cert. den. 315 U. S. 800; *Asgill v. United States*, 60 F. 2d 776, 779 (CA-4); *U. S. v. Krulwich*, 145 F. 2d 76 (CA-2); *U. S. v. Toner, et al.*, 77 F. Supp. 908, 917 (E. D. Pa.), rev. on other grounds, 173 F. 2d 140, 143 (CA-3). Cf. *Bumby v. U. S.*, 193 F. 2d 694 (CA-DC); *Marin v. U. S.*, 10 F. 2d 271 (CA-6). Some of these cases were decided before

the Criminal Rules of Procedure were promulgated and some of them after that date.

Other courts have held that it is not always erroneous for the court to refuse to order production of such documents. In *Boehm v. U. S.*, 123 F. 2d 791 at 805, the court said: "The trial court's refusal to compel the production of statements made by the government's witnesses before other witnesses on occasions other than on the pending trial manifestly affected no constitutional right of appellant." See also *U. S. v. Toner, et al.*, 77 F. Supp. 908, reversed on other grounds in 173 F. 2d 143; *Goldman v. U. S.*, 316 U. S. 129; *Marin v. U. S.*, 10 F. 2d 271 (CA-6); *Chemical Specialties Co. v. Ciba Pharmaceutical Co.*, 10 F. R. D. 500; *U. S. v. Rosenfeld*, 57 F. 2d 74 (CA-2); *Carpenter v. Winn*, 221 U. S. 533; *Bundy v. U. S.*, 193 F. 2d 694 (CA-DC); *Little, et al. v. U. S.*, 93 F. 2d 401 (CA-8), certiorari denied 58 S. Ct. 643, 303 U. S. 644, 82 L. Ed. 1105, rehearing denied 58 S. Ct. 756, 757, 303 U. S. 668, 82 L. Ed. 1124; *Chevillard v. U. S.*, 155 F. 2d 929 (CA-9). Many courts have announced that it is only when the witness uses the document while on the witness stand to refresh his memory that the right to compel production exists. *Lennon v. U. S.*, 20 F. 2d 490 (CA-8); *Morris v. U. S.*, 149 F. 123 (CA-5).

However, in view of our conclusion, further consideration of this procedural question is unnecessary to a correct disposition of the alleged error. Thus, admitting for the purpose of this decision that issuance of a subpoena was not a necessary condition precedent to the court's power to compel production of the documents requested, we have left for disposition the crucial question of whether it was reversible error to deny the request here. We think the rationale of the authorities as we read them leads to the conclusion that on this record the court committed no error, certainly no prejudicial error, in refusing to require the government to produce the statements. In the first place, defendants made no adequate showing that the documents were in the possession of counsel for the government then before the court. Even had they been, their production was proposed, insofar as the court was advised, for the sole purpose of impeaching the witness by showing his previous contrary statements. But, so far as the evidence discloses, there was no contradiction between the statements and his cross-examination. He was exhaustively cross-examined by two able counsel, and freely admitted that he did not name Gordon or MacLeod in the statements first made to

the F. B. I. Had they been produced, showing, in this respect, the very fact to which he testified, they would not have amounted to impeachment and would not, therefore, have been admissible. Under these circumstances, we think the court did not abuse its discretion.

In *U. S. v. Krulewitch*, 145 F. 2d 76 (CA-2), cited in this connection by defendants, the decision was limited to a situation where the document definitely contradicted the witness' testimony. Here, in contrast, there is nothing to suggest any such impeaching value in the statements in question. See also *U. S. v. Ebeling*, 146 F. 2d 254 (CA-2); *U. S. v. Walker*, 190 F. 2d 481 (CA-2).

Nor were the statements relevant because of the mere fact that the witness had made them. He had not used them in testifying; he had not referred to them to refresh his recollection. "The better rule is that where a witness does not use his notes or memoranda in court, a party has no absolute right to have them produced and to inspect them." *Goldman v. U. S.*, 316 U. S. 129, 132. It should be observed also that the Supreme Court in the case cited held that whether the government's files must be produced should in general be a matter for the determination of the trial judge. See also *D'Aquino v. U. S.*, 192 F. 2d 338 (CA-9).

Another aspect of defendants' cross-examination of Marshall requires consideration. It will be recalled that the witness had, on August 14, 1950, entered a plea of guilty before the District Court in Detroit, and that his case was then assigned to the Probation Officer for investigation. At the time of the trial no final disposition had been made of that cause.

On cross-examination it was brought out that the witness was an accomplice; that he had pleaded guilty to the same offense in the United States District Court in Michigan; that, though he had entered his plea some months before he testified in this trial, he had not yet been sentenced. He was interrogated at length concerning any promises of reward, leniency or consideration. The details appear in the footnote.¹ He testified that the United States Attorney had

1. The questions asked and answered by Mr. Marshall on cross-examination bearing upon this issue were in substance as follows:

Q. Had Mr. Scheer (the prosecuting attorney) promised you any immunity for your testimony which you were to give in any later proceedings?

A. No, there was never any promise.

Q. Had Mr. Schwartz (the witness's counsel) communicated to you any promise that had been given him by Mr. Scheer or the United States Attorney?

A. There was no promise.

not communicated to him and that his own attorney had not reported to him any promises that he would receive leniency or reward of any kind; that neither the United States Attorney nor any other person had, in the present case, made promises of any character to induce him to testify and that his own attorney had advised him not to do so.

After an extended cross-examination, defendants offered to prove that when he pleaded guilty in Detroit, the District Judge asked him, in open court, whether "anyone had promised him anything" to which he responded, "no"; "that he had not been forced to plead guilty"; that, thereupon, the court said, "very well, the plea of guilty is accepted. I am going to refer your case to the probation department for pre-sentence report. I think I should say to you, as I said to your attorney yesterday, * * * that it seemed to me that if you intended to plead guilty and expected a recommendation for a lenient sentence or for probation, it would be essential that you satisfy the probation department that you have given the authorities all the information, * * *. I am not holding any promises for you, but I think you would be well advised to tell the pro-

Q. Do you know whether Mr. Smith made any promises to your counsel?

A. Not that I know of.

Q. Did Mr. Schwartz communicate any such promise to you?

A. No, he did not.

Q. Do you hope by your testimony here to get off easy in your case in Detroit?

A. No, sir.

Q. You have no hope of that at all?

A. No, sir.

Q. And you are not just trying to do the best for yourself here on the witness stand, are you?

A. No.

Q. Did Mr. Downing tell you that if you testified favorably in this case that he would suggest to the probation department in Detroit that you would receive favorable consideration?

A. No.

Q. Did anybody in the United States Attorney's Office in Chicago make that suggestion to you?

A. No.

Q. Did Mr. Mehegan or Mr. McCormick say anything like that to you?

A. No.

Q. And you have no hope of immunity or reward for the testimony you are giving in this courtroom?

A. No, sir.

Q. Did any person whomsoever suggest to you that if you cooperated with the authorities in this case and testify against others, you would receive consideration?

A. No, sir. My attorney told me not to testify.

Q. Did you tell the District Judge in Detroit after you entered your plea of guilty that you were not guilty?

bation authorities the whole story even though it might involve others." It was this evidence which the court refused to admit.

We do not see in the proffered proof anything of substantial interest to defendants beyond what had been brought out in Marshall's cross-examination. It had been proved that he had not yet been sentenced, that his case had been delayed for pre-sentence investigation, and that he had not up to that time involved either defendant. The offered proof amounted merely to what had already been admitted by the witness, all of which was undisputed. If there was anything in the circumstances that he had pleaded guilty and had not yet been sentenced, and that he did not involve the defendants until later, which the jury considered of importance in determining his credibility, it had before it his own admissions in that respect and nothing in the transcript disputed them or added anything of substance thereto. Of course the court advised him that he would be well advised to tell the complete story. That is what any defendant or witness should do.

A. I told him I was not guilty of receiving stolen property with the knowledge it was stolen.

Q. You are not a defendant in this proceeding?

A. No, sir.

Q. The only proceedings in which you were a defendant was in Detroit?

A. That is right, sir.

Q. It is over nine months now that your plea in Detroit has been pending and is undisposed of and you have not been sentenced, * * have you?

A. No, sir.

Q. There is not even a date set for your sentence?

A. I don't believe so.

Q. Is this a certified copy of the information to which you pleaded guilty in Detroit before Judge Levin?

A. I believe it is.

Q. You have stated on cross-examination that you have not been given any promises for your testimony?

A. That is right.

Q. Nor any promise of any immunity or reward, is that true?

A. That is true.

Q. But you have not been sentenced?

A. No, sir.

Q. Have you been given any threats in connection with testifying here?

A. No, sir.

Q. You have cooperated with the F. B. I. in this matter since your plea, have you not?

A. I think so.

Q. You think so, that is, you have done what they have requested you to do?

A. Yes, sir.

We can not believe that the failure to admit the transcript could, in the slightest degree, have prejudiced the jury which had before it the undisputed facts in this respect. Obviously, motives of a witness may be fully investigated on cross-examination, but this record reflects a most thorough cross-examination as to all Marshall's actions and motives. Obviously, likewise, the state of mind of the witness as he testified, was an important criterion of his motives, but that element of the witness' testimony had been vigorously and fully explored. The offered evidence threw no further light upon or impeached in any way what he had already said. In our view, under the circumstances, it was not prejudicial error for the court to exclude the transcript; it was not abuse of the discretion concerning the scope and limitation of cross-examination, with which the trial court is endowed. *United States v. Hornstein*, 176 F. 2d 217.

We have considered carefully defendants' further contentions in regard to the limitations placed upon their cross-examination of Marshall and find no prejudicial error.

Defendants' final assignment of error concerns the court's instructions to the jury, both initially and in giving a supplemental charge similar to that approved in *Allen v. United States*, 164 U. S. 492. Reading the entire initial instructions as a whole, *United States v. Bucur*, No. 10429, decided January 15, 1952 (CA-7), no error appears. Though in certain instances, taken out of context, words appear which arguably were improper, these defects were cured when read in the setting which the court gave them.

The supplemental charge presents a slightly different problem. While it followed closely the words of the *Allen* decision, *supra*, it contained certain minor differences. Recently in *United States v. Furlong et al.*, 194 F. 2d 1 (CA-7), certiorari denied, this court had occasion to approve impliedly the continued use of the instruction. The charge there explained of directed the jury to examine the question with candor "and with a proper regard and deference to the opinions of each other" (emphasis supplied) as did the charge in the *Allen* case. Here, instead of the words italicized, there appear in the transcribed charge the phrase "of others." This difference, assert defendants, is vital, for, by virtue of it, the jury was advised to consider the opinions of other persons. We think the criticism over-meticulous and devoid of substance. The charge made it crystal clear that the jurors should consider the opinions

of each other and make every reasonable effort possible to reconcile any differences. They were advised that it was their convictions, *i. e.*, those of each of the panel, based upon the evidence, which should control and that the opinions of no witness and of no counsel was of the slightest importance or relevance. They could not have possibly been misled.

The court added also that the case "must at some time be decided." Strictly speaking, this was not true, for it is possible that no jury would ever agree. However we think the language was far from prejudicial error, for the court expressly explained that it was the jury's duty to decide the case, only if it could conscientiously do so.

We conclude that the court did not commit prejudicial error in its charge. However, we should observe that the Supreme Court, in the *Allen* case, fixed the extreme limits beyond which a trial court should not venture, in advising the jury as to its duty to attempt to agree.

The judgments are affirmed.

And on the same day, to-wit, on the fourteenth day of May, 1952, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Wednesday, May 14, 1952.

Hon. J. Earl Major, Chief Judge,
Hon. F. Ryan Duffy, Circuit Judge,
Hon. Walter C. Lindley, Circuit Judge.

United States of America.

Plaintiff-Appellee,

10439

U.S.

Kenneth C. Gordon and Kenneth

J. MacLeod,

Defendants-Appellants.

Appeal from the
United States Dis-
trict Court for the
Northern District
of Illinois, East-
ern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgments of the said District Court in this cause appealed from be, and the same are hereby, **Affirmed.**

12
Order Denying Petition for Rehearing.

503

And afterwards, to-wit, on the twenty-ninth day of May, 1952, there was filed in the office of the Clerk of this Court a Petition for Rehearing which said Petition for Rehearing is not copied herein.

And afterwards, to-wit, on the seventh day of June, 1952, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Saturday, June 7, 1952.

Before:

Hon. J. Earl Major, Chief Judge,
Hon. F. Ryan Duffy, Circuit Judge,
Hon. Walter C. Lindley, Circuit Judge.

United States of America,
Plaintiff-Appellee,

vs.

10429
Kenneth C. Gordon and Kenneth
J. MacLeod,
Defendants-Appellants.

} Appeal from the
United States Dis-
trict Court for the
Northern District
of Illinois, East-
ern Division.

It is ordered by the Court that the petition for a re-
hearing of this cause be, and the same is hereby, Denied.

And afterwards, to-wit, on the eleventh day of June, 1952, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Wednesday, June 11, 1952.

Before:

Hon. J. Earl Major, Chief Judge,
Hon. F. Ryan Duffy, Circuit Judge,
Hon. Walter C. Lindeley, Circuit Judge.

United States of America,
— *Plaintiff-Appellee*,
10439 *vs.*
Kenneth C. Gordon and Kenneth
J. MacLeod,
Defendants-Appellants.

} Appeal from the
United States Dis-
trict Court for the
Northern District
of Illinois, East-
ern Division.

On motion of counsel for the appellants, it is ordered that the issuance of the mandate in the above entitled cause be, and the same is hereby, stayed for a period of thirty days from June 7, 1952 pursuant to the provisions of Rule 25 of the Rules of this Court.

And afterwards, to-wit, on the twentieth day of June, 1952, there was filed in the office of the Clerk of this Court a Praeipie for Transcript of Record which said Praeipie is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

United States of America, <i>Plaintiff-Appellee,</i> <i>vs.</i> Kenneth C. Gordon and Kenneth J. MacLeod, <i>Defendants-Appellants.</i>	}	No. 10439.
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PRAECIPE FOR TRANSCRIPT OF RECORD.

Please prepare a transcript of the record in the above entitled cause in the matter of the petition for certiorari to the Supreme Court of the United States, and include in the transcript in the order given below the following:

Placita.

Appearance for appellants.

Printed transcript of record of proceedings had in District Court.

Oral argument had, and cause ordered taken under advisement, filed February 20, 1952.

Opinion by Lindley, J., filed May 14, 1952.

Judgment, entered May 14, 1952.

Reference to petition for rehearing, filed May 29, 1952.

Order denying rehearing, entered June 7, 1952.

Order staying mandate, entered June 11, 1952.

All to be prepared in accordance with the Statutes of the United States and the Rules of Court.

George F. Callaghan,

Maurice J. Walsh,

Attorneys.

Endorsed: Filed June 20, 1952. Kenneth J. Carrick,
Clerk.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the papers filed and the proceedings had, made in accordance with the praecipe for transcript of record, filed June 20, 1952, in:

Cause No. 10439.

United States of America,

Plaintiff-Appellee,

vs.

Kenneth C. Gordon and Kenneth J. MacLeod,

Defendants-Appellants,

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I herewith subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 30th day of June, A. D. 1952.

(Seal)

Kenneth J. Carrick,
*Clerk of the United States Court of
Appeals for the Seventh Circuit.*

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 182

KENNETH C. GORDON and KENNETH J. MACLEOD, Petitioners,

vs.

THE UNITED STATES OF AMERICA

ORDER ALLOWING CERTIORARI—Filed October 13, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, limited to questions Nos. 2 and 3 presented by the petition for the writ.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(4494)

Office, Supreme Court, U. S.

FILED

JUL 7 1952

CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

LIBRARY
SUPREME COURT, U. S.

No. 182

KENNETH C. GORDON AND KENNETH J. MacLEOD,
Petitioners,

vs.

THE UNITED STATES OF AMERICA.

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT.**

MAURICE J. WALSH,
29 S. La Salle Street,
Chicago, Illinois,

GEORGE F. CALLAGHAN,
105 W. Adams Street,
Chicago, Illinois,

Attorneys for Petitioners.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1951.

No. _____

KENNETH C. GORDON AND KENNETH J. MACLEOD,
Petitioners,
vs.

THE UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT.**

*To the Honorable the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Your Petitioners, Kenneth C. Gordon and Kenneth J. MacLeod, respectfully pray for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on May 14, 1952, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division. Petition for Rehearing was denied June 7, 1952.

THE OPINION BELOW.

The Court of Appeals for the Seventh Circuit affirmed the judgment sentencing each of the petitioners to the custody of the Attorney General for a period of ten years.

The opinion has not yet been reported. It appears in the Record at page 493.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

1. Whether the use of a witness, called "an accomplice" by the Court below, who has given a series of statements or confessions, which do not implicate the petitioners but who, upon being offered leniency for full information, accuses the petitioners, gives rise to serious questions of credibility? And is not a defendant entitled to probe such credibility and to have such issue submitted to the jury?

2. Where the key witness for the prosecution has given damaging evidence against the defendants and it is developed on cross-examination that the witness at the time of his arrest and on several occasions thereafter made written statements to the FBI in which he failed to implicate the defendants and in fact named another person as the one from whom he obtained the stolen merchandise, is it error to deny inspection and production of and cross-examination on the previous statements so that a full and complete disclosure may be had?

3. Is it an undue restriction of cross-examination and deprivation of a fair trial to prohibit cross-examination of the Government's key witness which would have shown that at the time he entered his plea of guilty to the offense about which he testified against the defendants his own case had been referred to the Probation Department for presentence recommendation; that the witness' lawyer and the prosecutor had discussed disposition of the witness' case in chambers with the Court the previous day; that

he was advised by the Court that if he expected a recommendation for lenient sentence or for probation, it would be essential that he satisfy the Probation Department that he had given the law enforcement authorities full information, and that he was admonished by the Court that he would be "well advised" to tell the probation authorities the whole story even though it might involve others.

4. Where by equivocal instructions to the jury the defendants have been deprived of the presumption of innocence; the guilt of one or either of them became the guilt of both; has the verdict been found by the jury according to the procedure and standards appropriate for criminal trials in the federal courts?

5. Should the conviction stand, where, after a jury has deliberated for eleven hours, the trial court gives a supplemental instruction to the jury, charging that the case "must at some time be decided", and repeats the instruction in written form an hour later; and the instruction departs seriously and prejudicially from approved form, by directing that the jurors decide the case with a proper regard and deference to the opinions "of others"?

6. Has "market value" (Section 2311, Title 18, U. S. C. A.) "of \$5,000.00 or more" (Section 2314, Title 18, U. S. C. A.) been proved in a prosecution for transporting stolen property from one state to another, where the only evidence on the question of value is a retail price list, showing only prices of individual rolls of film and which prices admittedly include a charge for processing and developing the film? And is not this proof particularly deficient, where the film is in a wholesale lot, and the amount of the service cost or charge was kept out of evidence by the Government's objections?

SUMMARY STATEMENT OF MATTER INVOLVED.

The record is lengthy but the facts necessary to a disposition of this proceeding lie within narrow compass.

Petitioners were indicted on four counts, I and III of which averred their unlawful possession of goods stolen while in interstate commerce, in violation of 18 U. S. C. 659, and II and IV, that they caused the property mentioned in I and III to be transported further in interstate commerce in violation of 18 U. S. C. 2314. The jury found both petitioners guilty, whereupon judgment entered, imposing upon each a sentence of ten years.

The salient essential facts are as follows: On July 10, 1950, a large quantity of camera film was stolen from an interstate shipment which had, as its origin, Rochester, New York and, as its destination, Chicago, Illinois. No point was made on appeal or is made in this proceeding as to the theft from the interstate shipment. The charges against petitioners concern the possession and transportation in interstate commerce after the theft.

James A. Marshall, was the Government's chief and key witness. It was upon his evidence as to the meetings, conversations and happenings between the witness, one Swartz, and the petitioners on July 20 and July 27, 1950 that the conviction rests. His evidence implicating the petitioners with the occurrence on July 20, 1950, was uncorroborated. Agents of the FBI did corroborate Marshall's testimony as to certain physical activities on July 27, 1950, but did not hear any conversations which were described by Marshall, and which were essential in considering knowledge and intent of the petitioners. Swartz died before trial and was dismissed from the indictment.

Marshall testified that on July 20, 1950, he and the deceased Swartz came to Chicago from Detroit and obtained

R

some of the stolen film from Gordon and a man "who resembled MacLeod" (R. 155); that he and Swartz took the film back to Detroit; that on July 22, 1950, he and Swartz procured additional film from Gordon (R. 162-3). (This offense was not charged in the indictment.) On July 27, 1950, he and Swartz again came to Chicago; met Gordon at his jewelry store and were given directions to an address in Chicago where he met MacLeod and again obtained film which they took back to Detroit (R. 166-170). Marshall was arrested in Detroit on July 28, 1950, and a part of the stolen film was found in his possession (R. 176). He had sold some and given the money to Swartz (R. 178).

Cross-examination developed that on arrest he was questioned for an hour by FBI agents and made a written statement or confession. (The District Attorney was asked if he had the statement and said he didn't have it in Court.) A demand for its production was denied (R. 194). It was shown the statement in no way implicated either defendant and a demand for its production was again denied (R. 205). In this first statement he said he got the film from Swartz (R. 205) but didn't remember if he said he purchased it from Swartz (R. 206). After his arrest on July 28th it was an every day occurrence for him to make statements to the FBI (R. 206). He made quite a few statements, either four, five or six and signed each one and each statement varied slightly. Each time he added something he remembered (R. 206). Between July 28th and August 25th he made five statements to the FBI but did not implicate the defendants until August 25, 1950 (R. 207), a week after his own plea of guilty in Detroit on August 18th, 1950 (R. 197). A demand for the production and inspection of all of these statements was again made and denied (R. 207).

Marshall came to Chicago on the first occasion at

Swartz's suggestion (R. 172) and gave Swartz the money he collected on the film he sold in Swartz's office (R. 178). Swartz paid his expenses from Detroit to Chicago on the first trip (R. 180). He didn't remember if he gave Swartz any more than \$1050.00 (R. 186). At the garage on July 20th it was Swartz who selected the film to be put in the car (R. 191). The only person to whom he gave any money was Swartz (R. 207). He gave Swartz some money but didn't remember whether it was several hundred dollars or forty dollars or ten dollars nor when he gave it to him. He had \$600 or \$700 in his pocket on the first trip to Chicago and may have given Swartz around \$300 (R. 208). He was to turn the money over to Swartz as he sold the film (R. 208). He and Swartz were splitting the profits. Prior to July 20th he had done business with Swartz and had gotten things off of Swartz (R. 209). He never saw Swartz give Gordon or MacLeod any money (R. 218). On each occasion part of the film was dropped off at Swartz's home in Detroit.

Marshall insisted throughout his cross-examination that he was not testifying by reason of any threats, hope, or promise of immunity. (See footnote to opinion Court of Appeals (R. 498).) He said that no person had suggested to him that if he cooperated with the authorities, and testified against others, that he would get consideration (R. 204).

Cross-examination as to whether at the time of his plea of guilty in Detroit he was advised in open Court that his counsel and the prosecutor had been in chambers and discussed disposition of his case with the Judge was met by objection (R. 198). The jury was excluded and defendants offered to prove from a transcript that at the time he entered his plea of guilty, he insisted to the Court, over that plea, that he still was not guilty; that he told the

Court no one had promised him anything and that in open Court the District Judge said to him:

"Very well, the plea of guilty is accepted. Now I am going to refer your case to the Probation Department for presentence report. I think I should say to you, as I said to your lawyer yesterday when he and Mr. Smith called upon me in chambers yesterday morning, that it seemed to me that if you intended to plead guilty and expected a recommendation for a lenient sentence or for probation from the Probation Department that it would be essential that you satisfy the Probation Department that you have given the law enforcement authorities all the information concerning the merchandise involved in this proceeding and it is very important for the law enforcement authorities to apprehend all of those who participated in this rather large theft from the interstate commerce shipment. I am not holding out any promises to you, but I think you would be well advised to tell the probation authorities the whole story even though it might involve others." (R. 198-199.)

The Court sustained the Government's objection and forbade the proffered cross-examination (R. 200). Counsel for the defendants were forbidden to ask the witness whether he had been told by the District Judge that if he expected any leniency he better cooperate with the law enforcement authorities (R. 200).

To establish "value of more than \$5000.00" necessary under Section 2314 Title 18 U. S. C. the Government relied upon one Vayo, Traffic Manager of Eastman Kodak Company, the shippers. (Failure of proof thereon was raised in the Court of Appeals but not ruled on specifically in the opinion.) His testimony was based upon a retail price list printed by the Company (R. 31-32). He did not testify to any sale or offer of sale. He did not know the selling price in Chicago (R. 55). He said he was familiar with the prices to the Eastman Stores in Chicago (R. 55) be-

cause of what is shown on the 1949 price list from which he testified (R. 56). This was all the Government's proof on value.

The petitioners both testified and denied all complicity in the offenses. Both gave evidence tending to prove that the film belonged to Swartz and that it had been stored by them as an accommodation to Swartz and turned over to Swartz when he and Marshall called for it on July 27th, 1950. They denied all knowledge of its stolen character. Gordon (R. 338-356) MacLeod (R. 358-390).

Included in the charge to the jury was the following:

"Now, before you can find either defendant guilty on Counts 1 and 3 of the indictment the Government must prove, from all of the evidence and beyond a reasonable doubt, all of these 4 things:

"If the Government proves all four of these propositions beyond a reasonable doubt as to **either or both** of the defendants on Counts 1 and 3, then such defendant or defendants can be found guilty by you on such count; otherwise they should be found not guilty on such count. (R. 431.)

"Now, as to Counts 2 and 4, before you can find either defendant guilty under the charges contained in Counts 2 and 4 of the indictment, the Government must prove beyond a reasonable doubt each of the 4 following items:

First, that the defendants, or **one of them, either of the defendants, a particular defendant,** knowingly transported, actively participated in or aided in transporting in interstate commerce from the City of Chicago in Illinois, to the City of Detroit, in Michigan, the merchandise described in Counts 2 or 4." (R. 432.)

"If the Government successfully proves all four of those items with reference to **either** Counts 2 or

4 beyond a reasonable doubt against **either or both** defendants, then you can find such a defendant guilty on such count." (R. 433.)*

"Now, the defendants in this, as in every other criminal trial, come to court presumed to be innocent, and that presumption protects them until such time as when the jury shall believe from the evidence beyond a reasonable doubt that the defendant, or **either of them**, is guilty as charged in the indictment." (R. 434.)†

(This was the only charge given on the presumption of innocence.)

At 10:35 P. M., the jury having been out 11½ hours, the Court advised counsel he would give the jury an instruction as taken from *Allen v. United States*, 164 U. S. 429 (R. 445). The Court stated that if the jury requested further instructions he would advise them that the instructions already given were sufficient to guide their further deliberations (R. 446). Over objection (R. 445) the Court gave the supplemental instruction which included the following:

"Although the verdict to which each juror agrees must of course be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusions of his fellows, yet in order to bring 12 minds to a unanimous result, you must examine any questions submitted to you with candor and with a proper regard and deference to the **opinions of others**. You should consider that **the case must at some time be decided.**" (R. 446-7.)

At 11:30 P. M., at the request of the foreman of the jury, and out of the presence of the petitioners and without

* Exception appears R. 440.

† No exception was taken to this instruction and the Court of Appeals was requested to consider it as "plain error" because of the importance of the presumption of innocence.

notice to them or to their counsel, a typewritten copy of that charge was sent to the jury room (R. 471).

REASONS FOR ALLOWANCE OF WRIT.

I.

On cross-examination of the Government's main witness defendants elicited that following his arrest by agents of the FBI he made a written statement concerning the details of the crime in which he in no way implicated either defendant. Furthermore he admitted having made four or five additional statements to the FBI between the date of his arrest and August 25, 1950. The statements varied from each other, and it was not until the last one, on August 25, that he in any way connected the defendants with the undertaking (See opinion, R. 495).

Inspection and production of these statements was denied by the trial Court (R. 194, 205, 207), and the Court of Appeals affirmed the denial (R. 494-497).

The Court of Appeals finds a conflict of decision in that some Circuits have held that the courts should compel production of pertinent documents and other Circuits have held it is not always error to refuse to order their production (R. 495-6).

The Court of Appeals has held there was no impeachment basis shown between the statements of the witness and his cross-examination because the witness admitted he had not named the defendants in the statements first made to the FBI (R. 496).

The Court's finding makes it pointedly apparent why the statements should have been produced. Necessarily, only an examination of the statements would show the extent to which they varied and contradicted the witness in particulars other than those disclosed by the preliminary

cross-examination. The opinion of the Court of Appeals in assuming, speculatively, that the statements had no value for impeachment purposes assumes that the exploratory nature of the cross-examination must have been limited to a consideration of the fact that the witness had not named the defendants in the statements. The holding of the Court of Appeals excludes the idea that lies at the bottom of all cross-examination, to-wit, that it is designed, not only to develop the facts of a case, but to test the witness in matters of recollection, of prejudice or bias, motive, and of truthful statement.

The holding of the Court of Appeals is in conflict with the decision of this Court in *Alford v. United States*, 282 U. S. 687, stating "Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; * * * To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial (Citing cases)."

The holding of the Court of Appeals on this point is also in direct conflict with the decision of the Court of Appeals for the Second Circuit in *United States v. Krulewitch*, 145 F. 2d 76 (Br. p. 56), and the Court of Appeals for the Eighth Circuit in *Heard v. United States*, 255 F. 829.

Petitioners were tried and convicted by the Government and sentenced to terms of imprisonment for ten years while at the same time evidence was kept out of the trial that might have shown Marshall was unworthy of belief and which might have shown the complete innocence of petitioners. This practice has been uniformly condemned by the Court of Appeals for the Second Circuit. *United States v. Zwillman*, 108 F. 2d 802 (C. A. 2d, 1940), *United*

States v. Andolschek, 142 F. 2d 503 (C. A. 2d, 1944), *United States v. Beekman*, 155 F. 2d 580 (C. A. 2d, 1946), *United States v. Grayson*, 166 F. 2d 863 (C. A. 2d, 1948), cf. *Edwards v. United States*, 312 U. S. 473, 61 S. Ct. 669, 674 (1941).

The case of *Goldman v. United States*, 316 U. S. 132 cited in the opinion herein (R. 497) is not remotely apposite to the facts of this case. The case holds only that there is no error in denying inspection of the notes and memoranda made by a witness during an investigation when the notes or memoranda are not used in Court. The case did not involve, as here, a series of statements or confessions made to the FBI by a participant in the crime shortly after his arrest.

The language of this Court in the recent case *On Lee v. United States*, 96 Law. Ed. Adv. Op. 776 is appropriate here, "The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility. To the extent that they do, a defendant is entitled to broad latitude to *probe credibility by cross-examination* and to have the issues submitted to the jury *with careful instructions*." (Italics ours.)

II.

The Court of Appeals has so far departed from the established decisions, and the usual and accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The Court of Appeals has overlooked the important bearing which the witness's hopes for lenient sentence and his relationship to the prosecution had on his motive in testifying. As appears in the footnote to the opinion, the witness had repeatedly disavowed any promise or hope

of consideration for his testimony (R. 497-8-9): Had the transcript of the proceedings in Detroit been admitted in evidence or a reasonable cross-examination permitted thereon, it would have been disclosed that Judge Levin in Detroit had made statements to the witness from which he must have believed that he could expect a lenient sentence or probation for his cooperation with the law enforcement authorities (R. 198-201). Had this proceeding in Detroit been admitted and cross-examination permitted thereon, the jury would have seen and learned that Marshall's testimony that he had no hopes or promises was untrue. It would have shown his motive and the relationship which existed between this would-be probationer and the party for whom he was testifying. The lower Courts have misapprehended the purport of the decision in *Alford v. United States*, 282 U. S. 687, 692. There an analogous situation was presented and this Court, with respect to the limitation of cross-examination, said:

"The purpose obviously was not, as the trial court seemed to think, to discredit the witness by showing that he was charged with crime, but to show by such facts as proper cross-examination might develop, that his testimony was biased because given under promise or expectation of immunity, or under the coercive effect of his detention by officers of the United States, which was conducting the present prosecution."

"The trial court cut off *in limine* all inquiry on a subject with respect to which the defense was entitled to a reasonable cross-examination. This was an abuse of discretion and prejudicial error." (Citing cases.)

The cross-examination of Marshall relative to the proceedings in Detroit was not limited to his impeachment on previous answers on which he denied promises or hopes of immunity but extended to his motive and his relationship to the prosecution. See *Meeks v. United States*, 163 F. 2d 598, (Br. p. 57).

We call the attention of the Court to the direct examination of the witness Marshall. Therein the prosecutor opened the door widely for a cross-examination as broad as that sought by the defendants, and it was error to deny the requested details of the proceedings had in the Detroit Court. At R. 175 the following appears:

"Q. In connection with the charges arising out of such arrest have you entered any plea in the Federal District Court of Detroit?

"A. Yes, sir, I pleaded guilty on possession of this film.

"Q. And have you been sentenced as yet in connection with the matter?

"A. No, I haven't."

While the Court of Appeals recognizes the well established law and that Marshall was the type of witness requiring the most extended freedom of cross-examination (R. 494), it affirms the denial of that freedom (R. 500).

In this regard the decision herein is at variance and in conflict with the decision of this Court in *Alford v. United States*, 282 U. S. 687, and of the Ninth Circuit in *Meeks v. United States*, 163 F. 2d 598, the Sixth Circuit in *Sandroff v. United States*, 158 F. 2d 623, and *Farkas v. United States*, 2 F. 2d 644.

The decision and opinion of the Sixth Circuit in *Farkas v. United States*, 2 F. 2d 644, 647, is directly in point and clearly indicates the error here.

"Inasmuch as the question involved is the motive for testifying falsely and therefore, the state of mind of the prosecuting witnesses, the relevant evidence is not alone the acts or attitude of the district attorney but anything else that would throw light upon the prosecuting witnesses' state of mind. It is therefore entirely proper, either by cross-examination of the witness himself, or otherwise, to show a belief or even only a hope on his part that he will secure immunity or a lighter sentence, or any other favorable treatment, in

return for his testimony, and that, too, even if it be fully conceded that he had not the slightest basis from any act or word of the district attorney for such belief or hope. The fact that despite a plea of guilty long since entered, the witness had not yet been sentenced, is proper evidence tending to show the existence of such hope or belief." (Italics ours.) This case is cited three times in *Alford v. U. S.*, 282 U. S. 687.

III.

Guilt has not been found by a jury according to the procedure and standards appropriate for criminal trials in the Federal Courts, where the following instructions given to the jury on the trial of two defendants were found only to be "arguably improper" but not error by the Court of Appeals:

"Now, before you can find either defendants guilty on Counts 1 and 3 of the indictment the Government must prove, from all of the evidence and beyond a reasonable doubt, all of these 4 things:

"If the Government proves all four of these propositions beyond a reasonable doubt as to **either or both** of the defendants on Counts 1 and 3, then such defendant or defendants can be found guilty by you on such count; otherwise they should be found not guilty on such count (R. 431).

"Now, as to Counts 2 and 4, before you can find either defendant guilty under the charges contained in Counts 2 and 4 of the indictment, the Government must prove beyond a reasonable doubt each of the 4 following items;

"First, that the defendants, or **one of them, either of the defendants, a particular defendant**, knowingly transported, actively participated in or aided in transporting in interstate commerce from the City of Chicago in Illinois, to the City

of Detroit, in Michigan, the merchandise described in Counts 2 or 4" (R. 432).

"If the Government successfully proves all four of those items with reference to either Counts 2 or 4 beyond a reasonable doubt against **either or both** defendants, then you can find such a defendant guilty on such count" (R. 433).*

"Now, the defendants in this, as in every other criminal trial, come to court presumed to be innocent, and that presumption protects them until such time as when the jury shall believe from the evidence beyond a reasonable doubt that the defendants, or **either of them**, is guilty as charged in the indictment" (R. 434).

A reading of the quoted instructions should make clear, without argument, the error urged.

No exception was taken to the last quoted instruction by which the jury was advised that the presumption of innocence obtains (as to both defendants) until such time as the jury shall believe beyond a reasonable doubt that "**either of them**" is guilty. Because the presumption of innocence lies at the foundation of the administration of our criminal law we request that this Court notice this as "plain error".

The decision of the Court of Appeals in holding these instructions not to be error is in direct conflict with the decision of the Court of Appeals for the Third Circuit in *Kosak v. United States*, 46 F. 2d 906, and the rationale of the decisions of this Court in *Bollenbach v. United States*, 326 U. S. 607, 613 and *Coffin v. United States*, 156 U. S. 432.

* Exception appears R. 440.

IV.

In the case at bar, the jury retired to deliberate at about 11:00 A. M. The trial Judge had instructed the Jury orally. At 3:00 P. M. that day the Court sent a transcript of his oral charge, which had been written by the Court Reporter to the jury. The trial Court stated that this was his regular practice, although the attorneys for the petitioners were not aware of this practice and had no actual notice that this transcript was to go to the jury or did go (R. 470-474).

At about 10:30 P. M. the jury had not returned a verdict, nor communicated to the Court. The Court called counsel to chambers and notified them that he intended to submit the "charge in the Allen case" (R. 445) (See *Allen v. United States*, 164 U. S. 492).

Counsel for the petitioners excepted to the instruction on the ground that it was coercive and that it instructed the jury that "the case must at some time be decided".

The Judge then stated that he would give the instruction and that nothing further would go to the jury (R. 446).

As given the instruction said, " * * * You must examine any question * * * with candor and a proper regard and deference to the opinions of others" (R. 447).

An hour later at 11:30 P. M. the foreman of the jury informed the Court that the jury desired a copy of this charge. The Court sent in a typewritten copy from which he had read (R. 471). Neither the petitioners nor their attorneys were present or had notice of this transaction (R. 470-474). The Jury delivered its verdict at 3:10 A. M. the following morning.

The Court of Appeals recognized, in its opinion, the departure from proper language, but held that the errors did not prejudice the defendants (R. 500-501). It made

no mention of the repetition of the instruction and the failure to afford notice or opportunity to object to the repetition.

Generally any communication with the jury out of the presence of and without notice to the defendants or their counsel is error. *Fillipon v. Albion Vein Slate Co.*, 250 U. S. 76, 81.

It is not true that a case must at some time be decided. A case may be so weak, circumstantial or dependent on witnesses whom no twelve persons could believe that a verdict could never result. *Peterson v. United States*, 213 Fed. 920, 926; *Quong Duck v. United States*, 293 Fed. 563, 565.

As given in this case at 10:30 P. M. and again at 11:30 P. M. after the mixed jury of eight (8) women and four (4) men had been confined for almost twelve (12) hours, can it be unreasonable to urge that the instruction as worded was equivocal and highly coercive? Might not these good citizens have reasonably believed that the language meant that they would be kept in session until a verdict was reached?

It is urged that this Court should compel compliance with the Court of Appeals' statement, "However, we should observe that the Supreme Court, in the *Allen* case, fixed the extreme limits beyond which a trial court should not venture, in advising the jury as to its duty to attempt to agree" (R. 501).

The admonition of the Court that the "opinions of others" should be considered could have caused the jury to believe after many hours of argument and continued confinement that the opinions of the press, the witnesses, Judge, prosecutor and general public should be considered.

The Court of Appeals holds this construction to be over meticulous, but it should be borne in mind that this

instruction came to the jury about twelve (12) hours after the original charge. The jury was not told to consider this supplemental charge together with all other instructions. The very fact that the jury requested a written copy, demonstrates that the supplemental charge was an undue and persuasive, if not coercive factor in the guilty verdict, returned at 3:10 A. M., after sixteen (16) hours of confinement and deliberation.

The increasing frequency with which some trial courts seek a disposition of protracted trials, by use of an admonition to agree, should be governed and restrained by an authoritative statement of the actual extreme limit beyond which trial courts cannot venture or err in advising the jury as to its duty to agree. This would settle a matter now left in doubtful authority because of equivocal action of the Court of Appeals, which affirmed the trial court's violation of the limit prescribed by the *Allen* case.

V.

Under Counts 2 and 4 charging violations of Section 2314, Title 18 (see Appendix) a value of Five Thousand Dollars (\$5,000.00) must exist, if the goods charged to have been transported are to be the subject of federal prosecution.

As to the value of the film the only witness relied upon by the Government was Vayo.

Asked as to the value of the film involved he requested permission to refer to notes. His notes were made simply from a price list of the Eastman Company (R. 32). He did not know the price at which the film sold in Chicago (R. 55) and knew only what "the books show, what is shown on the 1949 price list" (R. 56).

No appraisal evidence, or opinion, evidence by qualified

persons trading in the film or capable of appraising it, was offered, and no sale or offer to sell was proved.

It appeared on cross-examination of Vayo that all of the moving picture film is subject to the right of the consumer to have it processed and developed and that this factor was not evaluated. Vayo did not know its value (R. 71, 72).

Under these circumstances it is submitted that no proper or sufficient proof of this jurisdictional requirement of value under the statute was made. It is not appropriate to distinguish or support this position by reference to cases on value. The point made by petitioners is that there is no proof on which a judgment could be based on this essential factor in the offense.

The Court of Appeals does not discuss this point specifically, other than by reference, in stating that proof was sufficient to sustain the verdict if viewed in the light most favorable to the Government (R. 494).

The importance of the point is apparent when the sentences imposed on the petitioners are considered. The sentence was ten years each, the maximum on Counts 2 and 4. Counts 1 and 3 will not sustain more than one (1) year each, because no allegation of value was made in those counts, and therefore they charged misdemeanors under Section 659, Title 18, U. S. C. (See Appendix). *Cartwright v. United States* (C. A. 5), 146 F. 2d 133.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

GEORGE F. CALLAGHAN,

Attorney for Petitioner Gordon.

MAURICE J. WALSH,

Attorney for Petitioner MacLeod.

APPENDIX.

STATUTES INVOLVED.

Title 18, United States Code, Section 659, so far as pertinent provides:

"Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle * * * ; or

"Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen;

"Shall in each case be fined not more than \$5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed \$100, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both."

Title 18, United States Code, Section 2314, provides:

"Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud;

"Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both."

Title 18, United States Code, Section 2311, defines value:

"'Value' means the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the values thereof."

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1952.

No. 182

KENNETH C. GORDON AND KENNETH J. MacLEOD,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

GEORGE F. CALLAGHAN,
Attorney for Petitioner Gordon.
MAURICE J. WALSH,
Attorney for Petitioner MacLeod.

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REPLY BRIEF FOR PETITIONERS.

In Reply to the Brief for the United States in Opposition
to the Petition for Writ of Certiorari, the Petitioners sub-
mit the following arguments:

I.

With Regard to the Limitation of Cross-Examination.

The Government's Brief in opposition to the Petition for
Certiorari incorrectly states the questions presented, and
the prejudice claimed, by reason of the denial of cross-
examination. (Question 1, Government's Brief, p. 2.)

The Government assumes that the petitioners' claim of

prejudice arises from a refusal by the trial court to permit the petitioners to offer certain proof.

The petitioners do contend that they were prejudiced by denial of production of prior statements of the witness Marshall and by denial of leave to show affirmatively, the remarks regarding leniency by the judge before whom Marshall was awaiting sentence. However, this thwarting of attempts to prove affirmatively that the witness had made prior statements at variance with his testimony, and had named the defendants only after an admonition by the judge who was to sentence him, is only one facet of the errors complained of.

There was a complete and specific denial of cross-examination of the Government's key witness, Marshall, concerning these points. (R. 196-201.) At various points the attorneys for the petitioners again and again sought to ask questions which might elicit the facts demonstrated by their offers of proof. (R. 196, 198-201, 206, 207, 221, 222, 226, 228.)

The Court of Appeals, in its opinion (R. 496-497) refers to the fact that Marshall admitted he had not named the defendants in his first several written statements made to the F. B. I. It then reasons that the statements would not have impeached this admission, but completely overlooks the fact that the statements were made before admonition that if he expected leniency, or a recommendation therefor, Marshall would do well to advise the authorities of all persons involved. (R. 199.) No consideration was given to the possibility that the statements may have been completely exculpatory of the petitioners.

The petitioners contend that the motive of the witness in changing his story, after his plea of guilty and a judicial warning to aid authorities, was not subjected to the full light of searching examination which Marshall's character, as an informing accomplice required. (R. 494.)

Only the jury had the right or duty to judge what effect on Marshall's motives and testimony was created by the admonition of the judge who was to determine Marshall's fate, by sentence, after his testimony in the case at bar.

The jury was denied detailed or real knowledge of the contents of the statements made by Marshall, prior to his testimony; and indeed was completely denied any knowledge of the remarks implying leniency, made to him by Judge Levin in Detroit, who had withheld sentence of Marshall for some eight months. (R. 198-201.)

The determination of this part of the case by the jury was limited to the basis of Marshall's answers, that his prior statements were consistent with his testimony, and that he had received no threats or promises regarding immunity. These answers were only his conclusions, even if honestly made. The evidence which would have enabled the jury to determine the truth of his answers, his character, his motive, and his relation to the government, was excluded by the trial court when it cut off "*in limine*" cross-examination on subjects to which the defense was entitled to a reasonable cross-examination.

This was an abuse of discretion and prejudicial error. *Alford v. United States*, 282 U. S. 687, 692.

The prejudice of the trial court's erroneous rulings in this regard were emphasized by its refusal of a suggested instruction regarding the care with which the testimony of a person who anticipates immunity should be weighed. (R. 425, 455.)

II.

With Regard to the Instructions to the Jury.

A.

The Brief in Opposition does not argue in support of the language of the instructions complained of in the Petition for Certiorari.

The Government argues that in the instructions, the trial court gave a proper charge on the admission of evidence against each defendant. (Gov. Brief, p. 16.)

Four instances of the erroneous use of "either or both" are set out in the Petition at pages 15 and 16.

It is submitted that the language of this Court in *Bollenbach v. United States*, 326 U. S. 607, at page 612 is appropriate and we quote, "If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge."

B.

In so far as the supplemental instructions are concerned, the Government again seeks to excuse the obvious error of the trial court in charging the jury to consider the "opinions of others", by pointing to the unexceptional and unilluminating abstract charge that the jurors should consider "the opinion of each other". (Government Brief, pp. 17, 18.)

Certainly there is no question that the trial court made both statements to the jury. But neither statement limited or modified the other. The inclusion of both gives the instruction the status of an order to consider the opinion of *others* and of *each other*.

The Petitioners argue that the charge that the case

"must at some time be decided" is not harmless error, when considered in the light of the hour at which it was given, that is, 10:30 P. M. after the mixed jury of men and women had been confined for eleven hours.

The importance of this instruction cannot be overlooked, for the jurors, themselves, asked for a written copy of it an hour after it was given orally. Certainly, it cannot be assumed that the jurors were not affected by any phrase of the charge. It is reasonable to consider that the jurors may have dissected the charge and argued each sentence for meanings not usual or clear to laymen.

In the case at bar, after informing the defendants and their counsel, that no further instructions would be given to the jury, the court on request by the jury, not known to the defendants, sent the supplemental instruction to the jury. The defendants' attorneys later learned of this, a day or so after sentence and put their objections of record. (R. 470-474.)

Thus, in effect, the erroneous and prejudicial admonition in the charge that "the case must at some time be decided" and that the jurors should consider the opinions "of others" and "of each other" was repeated, this time in writing. The hour was 11:30 P. M. and the men and women of the jury had been confined in deliberation for 12 hours. Their verdict of guilty was returned at 3:10 A. M., the following morning.

III.

With Regard to Proof of Value.

In its answer to the Point V of the Petition (p. 19) the Government has appraised the value of the witness Vayo too highly. (Gov. Br., 19.)

The Government in its Brief (p. 19) states that Vayo, a traffic manager, testified to prices as set forth in the "official" Eastman price list. This witness, however, also testified that his company put out many price lists, perhaps a hundred, and that he was not familiar with the lists, did not know the prices of any sales at retail in Chicago, and was not familiar with matters issued by the sales department. (pp. 72, 73.) He was a traffic manager.

The heart of the Petitioners' point in this regard is that neither the witness nor the price list were competent to prove *value*. No other evidence was introduced. The issue involved is *value*, not price.

The list did not contain any mention of one of the four types of film. (R. 64.) The witness could not evaluate the factor of value involved in processing or developing. (R. 71.) The Government's statement that the right to have the film processed attaches to the film (Gov. Br., 19), has no basis in the evidence and is invalid in law, because certainly, an inchoate right to have the film processed or developed would not be subject to enforcement or have value to anyone but a purchaser for consideration which had passed to the Eastman Co.

Thus the film alone, before sale for consideration creating a contract to develop it, is far less valuable than the film coupled with the right of development.

The figures put in evidence over objection of the defendants included the price of the development contract. (R.

71.) However, these figures were introduced with no proper foundation or basis for their admission.

The Petitioners contend that they were not convicted on competent and probative evidence in so far as the statutes require proof of value in excess of \$5,000.00.

Conclusion.

The Petitioners respectfully submit that a Writ of Certiorari should issue so that the substantial and prejudicial errors in their trial may be examined and their conviction reversed.

GEORGE F. CALLAGHAN,
Attorney for Petitioner Gordon.

MAURICE J. WALSH,
Attorney for Petitioner MacLeod.

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BRIEF FOR THE PETITIONERS.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT.**

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Argument:

- A. Where the key witness for the prosecution has given damaging evidence against the petitioners and it is developed on cross-examination that the witness at the time of his arrest and on several occasions thereafter made written statements to the FBI in which he failed to implicate the petitioners and in fact named another person as the one from whom he obtained the stolen merchandise, it is error to deny inspection and production of and cross-examination on the previous statements..... 10
- B. It is an undue restriction of cross-examination and deprivation of a fair trial to prohibit cross-examination of the Government's key witness which would have shown that at the time he entered his plea of guilty to the offense about which he testified against the petitioners his own case had been referred to the Probation Department for pre-sentence recommendation; that the witness' lawyer and the prosecutor had discussed disposition of the witness' case in chambers with the Court; that he was advised by the Court that if he expected a recommendation for lenient sentence or for probation, it would be essential that he satisfy the Probation Department that he had given the law enforcement authorities full information, and that he was admonished by the Court that he would be "well advised" to tell the probation authorities the whole story even though it might involve others..... 20

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BRIEF FOR THE PETITIONERS.

OPINIONS BELOW.

The trial court filed no opinion. The opinion of the Court of Appeals (R. 493-501) is reported in 196 F. 2d 886.

JURISDICTION.

The judgment of the Court of Appeals was entered on May 14, 1952 (R. 502). Petition for Rehearing was denied June 7, 1952 (R. 503). Petition for a writ of certiorari was granted October 13, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

The Writ of Certiorari was granted herein limited to questions 2 and 3 presented by the Petition for the Writ.

STATEMENT OF THE CASE.

Petitioners, Kenneth Gordon and Kenneth MacLeod, together with Albert Swartz, were indicted on four counts. Two counts averred their unlawful possession of goods stolen while in interstate commerce, in violation of 18 U. S. C. 659, and two other counts charged that they caused the stolen property to be transported further in interstate commerce in violation of 18 U. S. C. 2314. Swartz died before trial and was dismissed from the indictment. The jury found both petitioners guilty, whereupon judgment entered, imposing upon each a sentence of ten years. The Court of Appeals affirmed.

The salient essential facts are as follows: On July 10, 1950, a large quantity of camera film was stolen from an interstate shipment which had, as its origin, Rochester, New York and, as its destination, Chicago, Illinois. It was charged that petitioners did on July 20, 1950, possess (Count I, R. 3) and on the same date transport in interstate commerce (Count II, R. 4) a certain portion of the stolen property. Counts III (R. 4) and IV (R. 5) charge respectively that the petitioners possessed and transported in interstate commerce an additional portion of the stolen merchandise on July 27, 1950.

James I. Marshall, was the Government's chief and key witness. It was upon his evidence as to the meetings, conversations and happenings between the witness, Swartz, and the petitioners on July 20 and July 27, 1950, that the conviction rests. His evidence implicating the petitioners with the occurrence on July 20, 1950, was uncorroborated. Agents of the FBI did corroborate Marshall's testimony in a limited fashion as to certain physical activities on July

27, 1950. These agents, however, did not testify to any events or conversations leading up to the acquisition of the stolen film as described by Marshall.

Marshall testified that on July 20, 1950, he and Swartz came to Chicago from Detroit by automobile (R. 152); that he was introduced to Gordon by Swartz in Gordon's jewelry store and that Swartz and Gordon conversed in the back room of the store; that thereafter he, Swartz and Gordon drove to a garage, the location of which he did not know. A truck was backed out of the garage and the witness drove his car into the garage. Marshall said that a man who "resembled" MacLeod was present (R. 155). Under Swartz's guidance, cases of film which were stacked in the garage were put into the car and Swartz and the witness then drove the car to Detroit (R. 156). Some of the stolen film was dropped off at Swartz's home in Detroit and the rest was taken to Marshall's store (R. 157).

Marshall said that on July 22, 1950, he and Swartz again came to Chicago and met Gordon (R. 162). Swartz and Gordon had a conversation and then Gordon and the witness loaded about 10 or 11 cases of the film into the witness' car from a truck which was standing near by and the stolen film was then taken back to Detroit (R. 163-164). This event is not charged in the indictment, and the evidence was limited to "intent" of Gordon (R. 434).

On July 27, Marshall and Swartz again came to Chicago by automobile and Swartz again talked to Gordon in the jewelry store. Gordon gave Swartz a slip of paper containing the address 215 East Erie Street and the name "Ken" was on the slip (R. 166-167). The witness and Swartz went to the given address where they met MacLeod; that MacLeod, Swartz and the witness went to a garage adjacent to 215 East Erie Street where some cases of the stolen film were unloaded from a truck in the garage.

The witness' car was backed into the garage and the film was placed therein. The truck involved was the same truck the witness had seen on the two previous occasions (R. 168-170). Swartz and the witness drove the witness' car back to Detroit. Part of the film was dropped off at Swartz's home and the balance was taken to the store of the witness (R. 172-173). Marshall was arrested in Detroit on July 28, 1950, and a large part of the stolen film was found in his possession (R. 176). He had sold some of it and given the money to Swartz (R. 178).

Cross-examination developed that on arrest he was questioned for an hour by FBI agents and made a written statement or confession. (The District Attorney was asked if he had the statement and said he didn't have it in Court.) A demand for its production was denied (R. 194). Further questioning showed that the statement in no way implicated either defendant and a demand for its production was again denied (R. 205). In this first statement he said he got the film from Swartz (R. 205) but didn't remember if he said he purchased it from Swartz (R. 206). After his arrest on July 28th it was an every day occurrence for him to make statements to the FBI (R. 206). He made quite a few statements, either four, five or six and signed each one and each statement varied slightly. Each time he added something he remembered (R. 206). Between July 28th and August 25th he made five statements to the FBI but did not implicate the defendants until August 25, 1950 (R. 207), a week after his own plea of guilty in Detroit on August 18th, 1950 (R. 197). A demand for the production and inspection of all of these statements was again made and denied (R. 207).

Marshall came to Chicago on the first occasion at Swartz's suggestion (R. 172) and gave Swartz the money he collected on the film he sold in Swartz's office (R. 178).

Swartz paid his expenses from Detroit to Chicago on the first trip (R. 180). He didn't remember if he gave Swartz any more than \$1050.00 (R. 186). At the garage on July 20th it was Swartz who selected the film to be put in the car (R. 191). The only person to whom he gave any money was Swartz (R. 207). He gave Swartz some money but didn't remember whether it was several hundred dollars or forty dollars or ten dollars nor when he gave it to him. He had \$600 or \$700 in his pocket on the first trip to Chicago and may have given Swartz around \$300 (R. 208). He was to turn the money over to Swartz as he sold the film (R. 208). He and Swartz were splitting the profits. Prior to July 20th he had done business with Swartz and had gotten things off of Swartz (R. 209). He never saw Swartz give Gordon or MacLeod any money (R. 218). On each occasion part of the film was dropped off at Swartz's home in Detroit.

Marshall insisted throughout his cross-examination that he was not testifying by reason of any threats, hope or promise of immunity. (See footnote to opinion Court of Appeals (R. 498)). He said that no person had suggested to him that if he cooperated with the authorities, and testified against others, that he would get consideration (R. 204).

Cross-examination as to whether at the time of his plea of guilty in Detroit he was advised in open Court that his counsel and the prosecutor had been in chambers and discussed disposition of his case with the Judge was met by objection (R. 198). The jury was excluded and defendants offered to prove from a transcript that at the time he entered his plea of guilty, he insisted to the Court, over that plea, that he still was not guilty; that he told the Court no one had promised him anything and that in open Court the District Judge said to him:

"Very well, the plea of guilty is accepted. Now I

am going to refer your case to the Probation Department for presentence report. I think I should say to you, as I said to your lawyer yesterday when he and Mr. Smith called upon me in chambers yesterday morning, that it seemed to me that if you intended to plead guilty and expected a recommendation for a lenient sentence or for probation from the Probation Department that it would be essential that you satisfy the Probation Department that you have given the law enforcement authorities all the information concerning the merchandise involved in this proceeding and it is very important for the law enforcement authorities to apprehend all of those who participated in this rather large theft from the interstate commerce shipment. I am not holding out any promises to you, but I think you would be well advised to tell the probation authorities the whole story even though it might involve others" (R. 198-199).

The Court sustained the Government's objection and forbade the proffered cross-examination (R. 200). Counsel for the petitioners were then forbidden to ask the witness whether he had been told by the District Judge that if he expected any leniency he better cooperate with the law enforcement authorities (R. 200).

A great volume of proof was introduced by the Government through the testimony of agents of the FBI concerning the recovery of the stolen merchandise from various places in Detroit, Michigan. Several employees of the trucking concern testified to the shipment of film from Rochester in New York to Chicago. An official of the Eastman Kodak Company gave evidence attempting to establish the value of the stolen merchandise. We do not set forth this evidence in this Statement of the Case because none of it is material to the questions presented on which the Writ of Certiorari was allowed.

The petitioners both testified in their own defense and denied all complicity in the offenses. They denied any

and all participation in the events described by Marshall as having occurred on July 20th and July 22nd. As to the events of July 27th, 1950, the petitioners both gave evidence that their connection with the stolen film on that date resulted from a favor extended to Swartz by Gordon in the use of the garage at 215 East Erie Street. This evidence tended to prove that the film belonged to Swartz and that it was stored in the aforementioned premises as an accommodation to Swartz and turned over to him when he and Marshall called for it on July 27th, 1950. Both petitioners denied all knowledge of the stolen character of the film (Gordon R. 338-356), (MacLeod R. 358-390).

SPECIFICATION OF ERRORS.

The Court of Appeals erred in holding that the trial court did not unduly restrict the cross-examination of the key witness for the prosecution in two instances:

1. In denying motions for the production, inspection and use on cross-examination of several written statements concerning the details of the crime made by the witness to agents of the FBI immediately after his arrest when it appeared that such statements, contrary to his testimony, did not implicate the defendants.

2. In forbidding cross-examination going directly to the motive and bias of the witness and denying a proffer of evidence to show that the witness was testifying with a hope and expectation of probation in his own case, pursuant to an admonition of the District Judge before whom he was awaiting sentence.

SUMMARY OF ARGUMENT

I.

Where Government's principal witness, who gave damaging testimony against the defendants admitted on cross-examination that he had, on his arrest, and on several occasions thereafter, made written statements which left the defendants on trial scatheless, it was error to refuse production, inspection of, and cross-examination upon those written statements.

Alford v. United States, 282 U. S. 687, 692, 75 L. Ed. 624.

United States v. Krulewitch, 145 F. 2d 76, 79 (C. A. 2).

Heard v. United States, 255 F. 829 (C. A. 8).

United States v. Andolschek, 142 F. 2d 503 (C. A. 2).

Asgill v. United States, 60 F. 2d 776 (C. A. 4).

On Lee v. United States, 96 L. Ed. Adv. Op. 776.

United States v. Zwillman, 108 F. 2d 802 (C. A. 2).

United States v. Beekman, 155 F. 2d 580 (C. A. 2).

United States v. Grayson, 166 F. 2d 863 (C. A. 2).

Edwards v. United States, 312 U. S. 473.

II.

It was prejudicial and reversible error to deny cross-examination of the Government's key witness as to statements or remarks to him by a Judge before whom he was awaiting sentence on his plea of guilty, and which remarks implied that probation would be forthcoming to the witness, if he satisfied the prosecuting authorities by his evidence; and it was error to deny leave to bring the Judge's statement to the witness to the attention of the jury.

Alford v. United States, 282 U. S. 687, 692.

Meeks v. United States, 163 F. 2d 598, 599 (C. A. 9).

Farkas v. United States, 2 F. 2d 644, 647-(C. A. 6).

Sandroff v. United States, 158 F. 2d 623, 629 (C. A. 6).

People v. Lacey, 339 Ill. 480, 485.

Hoyt v. People, 140 Ill. 588, 595.

Moore on Facts, Vol. II, Page 1154.

ARGUMENT.

It Is the Essence of a Fair Trial That Reasonable Latitude Be Given the Cross-Examiner. The Court Committed Prejudicial and Reversible Error in Unduly Restricting the Cross-Examination of Government Witness James I. Marshall.

The instances in which the cross-examination of the witness Marshall were unduly restricted constitute the basis for questions Nos. 2 and 3 presented by the Petition for the Writ of Certiorari upon which the Petition was granted. We shall discuss the questions in the order in which they are presented.

Question No. 2. Where the key witness for the prosecution has given damaging evidence against the defendants and it is developed on cross-examination that the witness at the time of his arrest and on several occasions thereafter made written statements to the FBI in which he failed to implicate the defendants and in fact named another person as the one from whom he obtained the stolen merchandise, is it error to deny inspection and production of and cross-examination on the previous statements so that a full and complete disclosure may be had?

Marshall was the Government's chief and key witness. Without his evidence as to the meetings; conversations and happenings between the witness, Swartz, and the defendants Gordon and MacLeod, the defendants could not have been implicated in the offense. Without his evidence of the possession of the alleged stolen film on the various dates involved, "possession" could not have been established in the defendants. Without his evidence as to the taking of the film to Detroit and its subsequent disposition, the

"transportation" could not have been proven. A rather complete summary of his evidence appears, *supra*, pages 3-6.

The case, except for the "interstate" and "value" features depended so entirely and completely on the testimony of Marshall that if his evidence was not believed, the record would not support the verdict. His veracity, interest, motive and bias were, therefore, extremely important. Marshall insisted throughout that he did not know the film which he transported to Detroit was stolen (R. 204-219) and, despite his plea of guilty at Detroit, told the court there that he did not know the property was stolen (R. 204). He testified, however, to participation in and all the details of the crime involved here and his testimony, therefore, must be treated as that of an accomplice.*

We believe we can safely say that the evidence of guilt of the petitioners, depending as it did so completely on Marshall's evidence, hung in such delicate balance that the slightest fact or circumstance, impugning the credibility of Marshall, would undoubtedly have brought a different result.

Cross-examination of Marshall developed that on arrest he was questioned for an hour by FBI agents and made a written statement or confession. (The District Attorney was asked if he had the statement and said he didn't have it in Court.) A demand for its production was denied

*While the testimony of accomplices will sustain a verdict, the fact that the judge should instruct the jury to accept it with caution—*Holmgren v. United States*, 217 U. S. 509, 524, 30 S. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778; *Caminetti v. United States*, 242 U. S. 470, 495, 37 S. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502, Ann. Cas. 1917B, 1168—serves to show that a case resting on such testimony is "weak." *Berger v. United States*, 295 U. S. at page 89, 55 S. Ct. 629, 79 L. Ed. 1314; *Arnold v. United States*, 10 Cir., 94 F. 2d 499, 501, 508; cf. *Nanfita v. United States*, 8 Cir., 20 F. 2d 376, 379; *Jones v. United States*, 53 App. D. C. 138, 289 F. 536, 539.

(R. 194). Further questioning showed that the statement in no way implicated either petitioner and a demand for its production was again denied (R. 205). In this first statement he said he got the film from Swartz (R. 205) but didn't remember if he said he purchased it from Swartz (R. 206). After his arrest on July 28th it was an every day occurrence for him to make statements to the FBI (R. 206). He made quite a few statements, either four, five or six and signed each one and each statement varied slightly. Each time he added something he remembered (R. 206). Between July 28th and August 25th he made five statements to the FBI but did not implicate the petitioners until August 25, 1950 (R. 207), a week after his own plea of guilty in Detroit on August 18th, 1950 (R. 207). A demand for the production and inspection of all of these statements was again made and denied (R. 207).

It is important to bear in mind the following testimony of the witness:

Marshall came to Chicago on the first occasion at Swartz's suggestion (R. 172) and gave Swartz the money he collected on the film he sold in Swartz's office (R. 178). Swartz paid his expenses from Detroit to Chicago on the first trip (R. 180). He didn't remember if he gave Swartz any more than \$1050.00 (R. 186). At the garage on July 20th it was Swartz who selected the film to be put in the car (R. 191). The only person to whom he gave any money was Swartz (R. 207). He gave Swartz some money but didn't remember whether it was several hundred dollars or forty dollars or ten dollars nor when he gave it to him. He had \$600 or \$700 in his pocket on the first trip to Chicago and may have given Swartz around \$300 (R. 208). He was to turn the money over to Swartz as he sold the film (R. 208). He and Swartz were splitting the profits. He had known Swartz for three years before coming to

Chicago and prior to July 20th he had done business with Swartz and had gotten things off of Swartz (R. 209). (A Government objection was sustained to questions having to do with his previous transactions with Swartz) (R. 209). He never saw Swartz give Gordon or MacLeod any money (R. 218). On each occasion part of the film was dropped off at Swartz's home in Detroit. An attempt to show that Marshall had in a previous proceeding testified that he bought the stolen film from Swartz was frustrated by a Government objection (R. 182-186).

We respectfully submit that contrary to the finding of the Court of Appeals the record clearly shows that Marshall's written statements were contradictory of his evidence on both direct and cross-examination and that had inspection of and cross-examination on these statements been permitted the testimony of the witness would have been successfully impeached. Preliminary cross-examination had shown that, contrary to his testimony from the witness stand, he had in his statement made upon arrest and in several statements thereafter failed to name or implicate either of the petitioners and had in fact stated that he got the film from his associate Swartz. This preliminary cross-examination showed that the several statements varied from each other, were added to each time, and that it was not until the last statement made on August 25, 1950, that he named either of the petitioners. This last statement was made a week after he had been brought to bar and was facing sentence upon an indictment charging him with possession of the stolen merchandise involved in this proceeding.

We call the attention of the Court to the transcript of the proceedings had in Detroit on August 18, 1950, when Marshall entered his plea of guilty (R. 198-199). There, after the Court had admonished Marshall to tell the probation

authorities the whole story even though it might involve others, Marshall stated to the Court, "Yes, sir. I told Mr. Sherry everything I knew, and I tried to be cooperative" (R. 199). Although Marshall had at this time made several written statements to the FBI he had not yet implicated the petitioners. We must assume he was truthful with Judge Levin. He did not name the petitioners until August 25th, one week after this Court appearance (R. 207). Having told the FBI "everything" he knew prior to naming the petitioners can there be doubt as to the statements being contradictory of his testimony in other particulars?

Not having implicated either of the petitioners in any of his statements until the last one of August 25th, 1950, we may well make the following inquiries: Who did he mention in all of the statements made prior to August 25th? How did the statements vary from each other and from his testimony? What further contradictions were there between his testimony and the statements than those shown by the preliminary cross-examination, viz., that he had not named the petitioners in his statements and had, in fact, named another as the one from whom he received the merchandise? What was added to each statement subsequent to the first one? Were the additions due to a faulty memory or was there a motive to conceal or fabricate? Why did he not mention the petitioners until the last statement made a week after his plea of guilty? Having said in his first statement that he got the film from Swartz (R. 206) what did he say with reference to Swartz in the subsequent statements? Did he name someone other than Swartz and the petitioners and, if so, who? Finally, were his statements consistent with the testimony given by the petitioners in their own defense?

In *United States v. Krulewitch*, 145 F. 2d 76 (C. A. 2),

inspection of a prior statement of a witness was refused as in this case. Judge L. Hand, speaking for the Court, said at page 79 ✓

“We hold therefore that the statement was competent to contradict the testimony of Joyce; and, except for what we shall say in a moment, if the accused had offered it in evidence, the error of excluding so much of it as contradicted her testimony—a matter to be determined by the judge—would have been apparent. That the accused did not do; on the contrary, he continued to demand an inspection of it, which was a different matter. It would have been proper to refuse that demand except for the fact that the statement was not competent until Joyce had been questioned as to whether she had not said what it purported to declare, and had been given an opportunity to admit that she had. *Conrad v. Griffey*, 16 How. 38, 46, 47, 14 L. Ed. 835; *The Charles Morgan*, 115 U. S. 69, 77, 78, 5 S. Ct. 1172, 29 L. Ed. 316; *Chicago, M. & St. P. R. Co. v. Artery*, 137 U. S. 507, 519, 11 S. Ct. 129, 34 L. Ed. 747; *Bennett v. Hoffman*, 2 Cir., 289 F. 797. But since the accused could not ask her these necessary questions in preparation for admission of the statement, it was proper for him to demand an inspection, and the refusal was erroneous.”

“That there are contrary decisions is true, but justice so plainly points in one way that we cannot hesitate to choose as we have indicated.

“Finally, we cannot disregard the error. One jury had already disagreed. The statement professed to be a complete account of Joyce's dealings with the accused, and it left him scatheless. Joyce herself was shown to be to the last degree untrustworthy; and we surely cannot say that this circumstantial story so totally at variance with her testimony, might not have created enough doubt to turn the scales in favor of the accused.”

Heard v. United States, 255 F. 829 (C. A. 8), is particularly applicable here because, there, as here, cross-examination was unduly restricted as to prior statements of the witness. The Court said at page 832:

"The cross-examiner has the right to prove by his adversary's witness, if he can, what inconsistent statements he has made, not only in general, but in every material detail, for, the more specific and substantial the contradictory statements were, the less credible is the testimony of the witness."

"A full cross-examination of a witness upon the subjects of his examination in chief is the absolute right, not the mere privilege, of the party against whom he is called, and a denial of this right is a prejudicial and fatal error."

"The refusal of the court below to permit counsel for the defendant *Heard* to draw forth from the witness *Ahring* by cross-examination the entire statement he first made relative to the robbery or theft too much restricted that examination and was erroneous."

In *Alford v. United States*, 282 U. S. 687, 692, 75 L. Ed. 624, this Court said:

"Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply. (Citing cases.) It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. (Citing cases.) To say that prejudice can be established only by showing that

the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. (Citing cases.)"

Petitioners were tried and convicted by the Government and sentenced to terms of imprisonment for ten years while at the same time evidence was kept out of the trial that might have shown Marshall was unworthy of belief and which might have shown the complete innocence of petitioners. This practice has been uniformly condemned by the Court of Appeals for the Second Circuit. *United States v. Zwillman*, 108 F. 2d 802 (C. A. 2d, 1940), *United States v. Andolschek*, 142 F. 2d 503 (C. A. 2d, 1944), *United States v. Beekman*, 155 F. 2d 580 (C. A. 2d, 1946), *United States v. Grayson*, 166 F. 2d 863 (C. A. 2d, 1948), cf. *Edwards v. United States*, 312 U. S. 473, 61 S. Ct. 669, 674 (1941).

In *United States v. Andolschek*, 142 F. 2d 503 (C. A. 2), the Court in considering the exclusion of certain reports of the defendant alcohol tax unit inspectors, said, page 506:

"While we must accept it as lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate."

In *Asgill v. United States*, 60 F. 2d 776 (C. A. 4), it appears that a witness for the Government had testified that she did not know the contents of certain letters written in her behalf and had signed certain letters without reading them. The Court, at page 779, said:

"Discussing the refusal of the court to require the

production of certain letters above referred to for the purpose of cross-examination, counsel for the government earnestly contends that an inspection of these letters discloses that, if produced, they would only serve the purpose of showing that Alice White Allen had repeatedly said that she was the common-law wife of James Allen, which was not disputed. This assumes that the exploratory nature of the cross-examination must have been limited to the consideration of that fact alone. It excludes the idea that lies at the bottom of all cross-examination, to wit, that it is designed, not only to develop the facts of a case, but to test the witness in matters of recollection, of prejudice or bias, and of truthful statement. The witness had denied a knowledge of the contents of the letters written in the very case now under consideration. She was an important witness for the government, and the defendant was entitled to the fullest opportunity to balance fact against fact, to weigh the testimony previously given against the testimony in the instant case, and, if possible, to ferret out every detail of the motive which induced her to change her former testimony and to testify as she did against the defendant."

The language of this Court in the recent case *On Lee v. United States*, 96 Law Ed. Adv. Op. 776, is appropriate here, "The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility. To the extent that they do, a defendant is entitled to broad latitude to probe credibility by cross-examination and to have the issues submitted to the jury with careful instructions."

We respectfully submit that the cases cited by the Court of Appeals in its opinion (R. 495-496) on this point are not apposite here, and do not support the conclusion reached. The cited cases do not involve, as here, a series of statements or confessions made to the FBI by a participant in

the crime shortly after his arrest which are shown to be contradictory of his testimony. They hold, in substance, the following: Notes of an FBI agent as to his investigation need not be produced. *United States v. Walker*, 197 F. 2d 491 (C. A. 2); *United States v. Ebeling*, 146 F. 2d 254 (C. A. 2); *Leon v. United States*, 40 F. 2d 490 (C. A. 8). There is no error in denying inspection of the private memoranda of a witness when the notes are not used in court. *Goldman v. United States*, 316 U. S. 129; *United States v. Rosenfeld*, 57 F. 2d 74 (C. A. 2). There is no error in denying production of work papers of the prosecutor in preparing his case. *D'Aquino v. United States*, 192 F. 2d 338 (C. A. 9). It is not error to refuse to compel the Government to produce transcripts of testimony given by witnesses before the Securities Exchange Commission. *Boehm v. United States*, 123 F. 2d 791 (C. A. 8). The government need not produce papers on file with the United States Commissioner which are equally available to the defense. *Marin v. United States*, 10 F. 2d 271 (C. A. 6). Books not mentioned on direct examination are not subject to production on cross-examination. *Chevillard v. United States*, 155 F. 2d 929 (C. A. 9). Although the accused has a right to inspect and use on cross-examination any paper used by a witness on direct examination to refresh his present recollection, this right does not exist if the statements are not used by the witness while testifying. *Little v. United States*, 93 F. 2d 401. A court of law may not under Section 724 Rev. Stat. 1901 compel one party to produce, before trial, books and papers for inspection of his adversary. *Carpenter v. Winn*, 221 U. S. 533.

In *United States v. Rosenfeld*, *supra*, it is interesting to note that the court made this significant statement: "These papers (statements made by Government witnesses preparatory to trial) are material only in so far as they contra-

dict what the witness has said on another occasion or has testified to on the stand."

Many matters material and necessary to establish the truth in this case could have been developed had these statements been made available for inspection and cross-examination. The trial of a case in which liberties are involved is not a sporting event or game, but a search for the truth. Marshall was peculiarly the character of witness requiring the exercise of the most extended freedom of the right of cross-examination. *Greenbaum v. United States*, 80 F. 2d 113 (C. A. 9).

II.

The second point upon which certiorari was granted is set forth as number three (3) of "Questions Presented", at Page two (2) of the Petition for Certiorari and reads as follows:

"3. Is it an undue restriction of cross-examination and deprivation of a fair trial to prohibit cross-examination of the Government's key witness which would have shown that at the time he entered his plea of guilty to the offense about which he testified against the defendants his own case had been referred to the Probation Department for presentence recommendation; that the witness' lawyer and the prosecutor had discussed disposition of the witness' case in chambers with the Court the previous day; that he was advised by the Court that if he expected a recommendation for lenient sentence or for probation, it would be essential that he satisfy the Probation Department that he had given the law enforcement authorities full information; and that he was admonished by the Court that he would be "well advised" to tell the probation authorities the whole story even though it might involve others."

The two (2) points urged in the Brief and upon which certiorari was granted are closely related.

The Defendants reassert their contention that without the testimony of Marshall there would have been no sufficient issue to submit to the jury.

The Court of Appeals below, in its opinion, said, "Marshall was peculiarly the character of witness requiring the exercise of the most extended freedom of the right of cross-examination" (R. 494).

Under these circumstances, the Defendants sought to show, and to submit to the jury occurrences which would show the witness Marshall's relationship to the prosecution, and which could have been a basis for the jury to draw the conclusion that Marshall's testimony was colored and motivated by a fear of punishment, and a hope for leniency, contrary to his testimony on cross-examination.

However, cross-examination of Marshall on the question of threat or promise was limited by the Court to asking for his conclusion concerning any threats or promises. While it is true that he insisted that he had not been threatened and had no hope or expectations or promises of reward or immunity for his testimony, counsel for the Defendants were forbidden to show on cross-examination or by proof, that events had occurred which would have shown that this testimony by Marshall was untrue (R. 201). (See footnote of the Opinion by the Court of Appeals below (R. 497, 498, 499).)

Although the Defendants were permitted to show by cross-examination that Marshall had plead guilty to possession of stolen property involved in the case at bar, and that he had not been sentenced at the time of the trial in this case, which occurred more than nine (9) months subsequent to his plea, all other cross-examination on the point

was cut off "*in limine*." *Alford v. United States*, 282 U. S. 687, 692.

The record at Pages 197-201 describes the manner in which evidence of these events was sought by cross-examination, and shows the trial court's ruling thereon.

Counsel for the Defendants read to the Court from a transcript of the proceedings before Judge Levin of Detroit, on Marshall's arraignment upon a charge of possessing part of the property involved in the case at bar. Marshall had freely admitted that he made "4, 5 or 6" signed statements each of which varied from the others and none of which named the Defendants here as participants in crime, all before the date of his arraignment (R. 206, 207). It was not until August 25th that he first named Gordon or MacLeod as participants in the crime (R. 207); this was one week after his arraignment before Judge Levin on August 18th, in Detroit (R. 198).

Judge Levin's statements to Marshall at that time included the following:

"Very well, the plea of guilty is accepted. Now, I am going to refer your case to the Probation Department for presentence report. I think I should say to you, as I said to your lawyer yesterday when he and Mr. Smith called upon me in chambers yesterday morning, that it seemed to me that if you intended to plead guilty and expected a recommendation for a lenient sentence or for probation from the Probation Department, that it would be essential that you satisfy the Probation Department that you have given the law enforcement authorities all the information concerning the merchandise involved in this proceeding." and

"As I understand it, there was a tremendous amount of film involved," and

"and it is very important for the law enforcement authorities to apprehend all of those who participated in this rather large theft from the interstate commerce shipment.

"I am not holding out any promises to you, but I think you would be well advised to tell the probation authorities the whole story even though it might involve others" (R. 199).

The trial court definitely and completely denied leave to inquire concerning Judge Levin's statement to Marshall, on cross-examination and forbade reference by counsel for the respective Defendants to these remarks by Judge Levin (R. 200, 201).

Probation, like parole, permits the enlargement of a convicted person subject to conditions which may be prescribed. It is a matter of discretion and may be revoked for conduct which the Court considers violative of the conditions imposed. Its grant is a matter of discretion when the Court is satisfied "that the ends of justice and the best interest of the public as well as the Defendant will be served thereby". Certainly an applicant for probation is a suppliant for liberty at the discretion of the Court (See Section 3651, Title 18). The prospective probationer certainly has no right to probation and, of course, recognizes that he must convince the Judge before whom his fate is pending that he has performed each and every condition imposed by the Judge.

The petitioner for probation is not concerned with legalistic niceties, and in his desire to avoid imprisonment seeks for inferences and implications in the procedure, and like a juror hearing instructions, hangs on every word uttered by the Judge.

In the case at bar, Marshall had not yet realized the full reward for his cooperation with the prosecuting authorities. The jury was denied all knowledge of the Court's remarks to Marshall and upon which he based his hopes of the forthcoming probation. The Defendants submit that Judge Levin's statement to Marshall was so phrased that

it led Marshall to believe that if he complied with the Judge's admonition to "satisfy the Probation Department that you have given the law enforcement authorities all the information concerning the merchandise involved in this proceeding" and "you would be well advised to tell the probation authorities the whole story even though it might involve others", then the witness could claim his long deferred reward, of "lenient sentence or probation".

Certainly the jury should have been informed concerning Judge Levin's statement so that it could judge whether the clearly implied promise and threat had affected Marshall's testimony. The only "law enforcement authority" involved in the matter were the agents of the Federal Bureau of Investigation, and the prosecutors, representing the same sovereign prosecuting the case at bar.

Marshall changed his story after Judge Levin's admonition, and for the first time, one week later, on August 25th, named MacLeod and Gordon, and told a story which apparently "satisfied" the agents for, of course, Marshall was still free nine (9) months later, when he testified in the case at bar.

As was stated in the trial court, the sword of Damocles was held over Marshall's head from the time of his plea until the completion of his testimony, and the condition upon which it would fall or be removed was clearly stated by the Judge before whom he had entered his plea of guilty (R. 199).

The jury which was to pass upon Marshall's credibility was denied complete opportunity to appraise the terms of the contract which Marshall appears to have fulfilled by his testimony.

In *Meeks v. United States*, 163 F. 2nd 598 (C. A. 9), a very similar situation occurred. The Defendant there was

denied permission to show that an important witness was a parolee, and to show the conditions of the parole.

The Court of Appeals there said, at Pages 599 and 600, "It is difficult to imagine a more direct and intimate relationship likely to affect one's testimony than that between the Plaintiff Government and its most important witness in establishing this first degree murder. Only by following the stated and other conditions of the parole would the Plaintiff permit the witness to remain out of the penitentiary."

After stating the conditions of the parole the Court further said (p. 600): "Such a witness who testified to such intimate relations with one proposing they join in a murder and who so claimed to have aided the Defendant, well could imagine that favorable testimony would procure a kindly and favorable consideration of the borderline question which might terminate his parole. * * * Unfavorable decision in any of these well could cause the Plaintiff's Marshall to take the Plaintiff's witness to the penitentiary".

The case of *Sandroff v. United States*, 158 F. 2d, 623 is directly in point. The Court said at page 629:

"In our judgment, the district court committed reversible error; in the first instance, in shutting off the cross-examination of Charles Ginns upon the question of promised or expected immunity; and, later, in refusing to permit his cross-examination upon the tendered subject matter pertaining to why he and his son Jack Ginns, who, though named as coconspirators in pari delicto with Sandroff, had not been included as defendants in the indictment. The two Ginns were the chief and indispensable Government witnesses in the prosecution of Sandroff and his company. In such circumstances, it was highly important that latitude be allowed in cross-examination to test their motives for testifying against Sandroff as bearing directly upon their credibility."

"The decision and opinion of this court in *Farkas v. United States*, 6 Cir., 2 F. 2nd 644, 647, is directly in point, and clearly indicates that the judgment below must be reversed and the case remanded for retrial."

"Inasmuch as the question involved is the motive for testifying falsely and therefore the state of mind of the prosecuting witness, the relevant evidence is not alone the acts or attitude of the district attorney but anything else that would throw light upon the prosecuting witnesses' state of mind. *It is therefore entirely proper, either by cross-examination of the witness himself, or otherwise, to show a belief or even only a hope on his part that he will secure immunity or a lighter sentence, or any other favorable treatment, in return for his testimony, and that, too, even if it be fully conceded that he had not the slightest basis from any act or word of the district attorney for such a belief or hope.* The fact that despite a plea of guilty long since entered, the witness had not yet been sentenced, is proper evidence tending to show the existence of such hope or belief." (Italics ours.)

The leading case on this point is the decision of the Supreme Court in *Alford v. United States*, 282 U. S. 687. This decision cites *Farkas v. United States*, 6 Cir., 2 F. 2nd, 644 three times, and the *Farkas* opinion contains the following language, "As bearing upon their credibility, motive for false accusations, as well as bias, was vitally relevant, and testimony tending to show such motive was entirely competent. Concededly promises of immunity are admissible;"

Other authorities which show that proper cross-examination was denied in the case at bar, are plentiful. Among them is *People v. Lacey*, 339 Ill. 480, 485, where the Court states:

"The witness was testifying as an accomplice and attempted to shift the main burden of the crime upon plaintiff in error, and under such circumstances his

cross-examination should not have been unduly limited, and plaintiff in error should have been given every opportunity to ascertain the motive with which the witness was testifying, so that the jury might be able to judge whether he was testifying to vindicate the law and preserve the good order of society or whether he was prompted by the desire to save himself from deserved punishment.

And at page 490:

"In the instant case no witness other than the accomplice, Phillips, gave any testimony directly tending to show plaintiff in error's complicity in the crime. The conviction, therefore, rests upon the testimony of such accomplice. It was therefore most highly important that the jury should be correctly instructed and that no errors be committed in the admission or rejection of evidence. This was especially true in this case, as the record shows that immediately after plaintiff in error's conviction the accomplice was released upon probation."

In Moore on Facts Vol. II page 1154 it is stated:

"It is a rule of practice at common law, and is frequently prescribed by statute, that a defendant should not be convicted of crime upon the testimony of an accomplice unless the latter is confirmed upon material points by evidence to which no suspicion attaches. It is a rule of practice as old as the other one, that the person who thus testifies *will not be punished* unless he tells an entirely different story on the stand from what he has told out of court. When a number of parties have been arrested, *there is always a strong temptation to throw the blame on each other*, and to buy immunity by evidence; and the stronger the suspicions are against one, the greater is the temptation, because he has less chance of escape in any other way." (Italics ours.)

In *Hoyt v. People*, 140 Ill. 588, 595, it is said:

"The principal evidence tending to prove the guilt of plaintiff in error is found in the testimony of his co-defendants—accomplices—who admit that they committed the arson, but say that plaintiff in error hired them to do it."

"But the authorities agree, and common sense teaches, that such evidence is liable to grave suspicion, and should be acted upon with the utmost caution for otherwise the life or liberty of the best citizen might be taken away on the accusation of the real criminal, made either to shield himself from punishment or to gratify his malice; and thus it is said in 1 Phillips on Evidence, (Cowen, Hill & Edw. notes) page 111; 'Accomplices, upon their own confession, stand contaminated with guilt. They admit a participation in the very crime which they endeavor, by their evidence, to fix upon the prisoner. They are sometimes entitled to even a reward upon obtaining a conviction, and *always expect to earn a pardon*. Accomplices are therefore of a tainted character, giving their testimony under the strongest motives to deceive.'" And it is said in Best on Evidence, (p. 266, sec. 170) in speaking of approvers and accomplices":

"* * * their single testimony, alone, is seldom of sufficient weight with the jury to convict the offenders, it being so strong a temptation to a man to commit perjury, if, by accusing another, he can escape himself."

It does not require indulgence in imagination to perceive that a witness, who at the time of his testimony is awaiting disposition of his own plea of guilty before a Judge, who admonished him as to his future conduct and its likely effect upon disposition of his case, would be a facile witness for the prosecution. Consequently the proceedings in Detroit bore importantly upon the motive and bias of Marshall. These proceedings should have been

disclosed to the jury, so that it would completely and properly estimate the credibility of Marshall. As this case was tried, the jury heard only Marshall's denials that he was acting from fear or hope of reward.

The error in denial of proper cross-examination was emphasized by the refusal of the trial court to give a suggested instruction regarding the care with which the testimony of a person who anticipates immunity should be weighed (R. 425, 455). No equivalent instruction was given by the trial court.

It is respectfully submitted that the Court of Appeals below erred in its decision confirming the conviction, and approved a practice which is contrary to the decisions of the Supreme Court and other Courts of Appeal on a matter of importance in the conduct of trials.

Conclusion.

The verdict in the case at bar was reached by a jury of men and women in continuous deliberation from eleven a.m. until about three a.m. the following morning (R. 445), and only after the trial court had given a supplemental and admonitory instruction on agreement (R. 447). Marshall's credibility was a principal issue, in a close case.

The errors in denying the Defendants the right to show Marshall's motives and bias, and to show the details of his statements in contradiction of his testimony, warrant a reversal of the judgment.

Respectfully submitted,

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APPENDIX.

STATUTES INVOLVED.

Title 18, United States Code, Section 659, so far as pertinent provides:

"Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck or other vehicle * * * ; or

"Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen;

"Shall in each case be fined not more than \$5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed \$100, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both."

Title 18, United States Code, Section 2314, provides:

"Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud;

"Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both."

Title 18, United States Code, Section 2311, defines value:

"'Value' means the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the values thereof."

Title 18, United States Code, Section 3651, provides:

"Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States, except in the District of Columbia, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best. * * *

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No. 182

In the Supreme Court of the United States

OCTOBER TERM, 1952

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SUPREME COURT, U.S.

KENNETH C. GORDON AND KENNETH J. MACLEOD,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 493-501) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 14, 1952 (R. 502), and a petition for rehearing was denied on June 7, 1952 (R. 503). The petition for a writ of certiorari was filed on July 7,

1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the trial court unduly limited the cross-examination of the Government's key witness, in denying petitioners' motions for the production and inspection of certain pre-trial statements by the witness, and in denying their offer of evidence respecting the comments of a trial judge in another jurisdiction before whom the Government witness had previously pleaded guilty for participation in the same crime.

2. Whether the trial judge properly instructed the jury to consider separately the guilt of each defendant.

3. Whether the trial court erred in sending to the jury a transcript of the oral charges in the absence of petitioners and their counsel, and in delivering a supplemental charge which admonished the jury to have a proper regard and deference to the opinions of others.

4. Whether there was adequate proof of the value of the stolen goods transported.

STATUTES INVOLVED

18 U.S.C. 659 provides in pertinent part:

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle * * * ; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen;

* * * * *

Shall in each case be fined not more than \$5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed \$100, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

18 U.S.C. (Supp. V) 2314 provides in pertinent part:

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud;

* * * * *

Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

STATEMENT

On December 1, 1950, in the District Court for the Northern District of Illinois, a four-count indictment (R. 3-5) was filed against petitioners and Albert Swartz.¹ Count 1 charged that on July 1950, petitioners unlawfully, wilfully and knowingly had in their possession Kodak film which had been stolen from a common carrier while moving

On May 28, 1951, the charges against Swartz, then deceased, were dismissed on the Government's motion (R. 16).

in interstate commerce from Rochester, New York, to Chicago, Illinois, in violation of 18 U.S.C. 659. Count 3 charged a similar offense on July 27, 1950. Count 2 charged petitioners with causing the property described in count 1, of a value of more than \$5,000 to be transported in interstate commerce from Chicago, Illinois, to Detroit, Michigan, in violation of 18 U.S.C. 2314. Court 4 charged a similar offense on July 27, 1950. After a jury trial, petitioners were found guilty and were sentenced generally to ten years' imprisonment, (R. 466-468). On appeal, the judgments of conviction were unanimously affirmed (R. 493-501).

The evidence in support of the verdict may be summarized as follows:

On July 8, 1950, a trailer of the Interstate Motor Freight System was loaded at Rochester, New York, with cartons of Eastman Kodak film for shipment to Eastman at Chicago (R. 79-80, 81-84). Heavy waterproof paper was placed around the merchandise for protection, and the trailer doors were sealed shut (R. 22, 81). The bill of lading for the shipment (Govt. Ex. 67, R. 87), and Eastman Kodak packing records (Govt. Ex. 76, R. 150), listed cartons numbered 355 through 360 as included in the shipment.

The trailer arrived in Chicago early in the morning of July 10, 1950, apparently in good condition (Govt. Ex. 70, R. 128; see also R. 93-95). On July 11, when a driver of the Interstate company went to get the trailer for delivery to Eastman, he found the seals broken and torn paper on the ground (R.

105-111). (See also R. 92-104, 113-127.) The F.B.I. was notified (R. 275) and the trailer was then delivered to the Eastman plant in Chicago where it was unloaded (R. 130).

A comparison of the goods received (Govt. Ex. 75, R. 150) with the goods shipped as shown by the original bill of lading (Govt. Ex. 67, R. 87), established that the shortage consisted of:

91 cartons	8 mm Kodachrome Roll
14 "	8 mm Kodachrome Magazine
13 "	116 Verichrome Kodak
6 "	16 mm Commercial Kodachrome

Included in the cartons found to be missing were the cartons numbered 355 through 360, inclusive, containing 16 mm Commercial Kodachrome film.

On July 27, 1950, an F.B.I. agent observed a car pull into an alley at 215 East Erie Street. The driver, subsequently identified as one Marshall, went into the building and returned in a minute or two with petitioner MacLeod. Marshall drove his car before the door of a garage at 215 East Erie Street and MacLeod opened the garage door. MacLeod then drove an old Chevrolet truck marked "F. White" from the garage into the alley, and Marshall backed his car into the garage. A passenger in Marshall's car, subsequently identified as Albert Swartz, stood in the alley while the car was backed into the garage. After about five or ten minutes Marshall and Swartz drove off. The agent saw the back seat full of cartons marked "Kodak". (R. 276-278.)

Marshall, a jeweler in Ferndale, Michigan (R. 151), was arrested on July 28, 1950 (R. 175). At petitioners' trial he was a witness for the Government. He testified that on July 20, 1950, he drove from Detroit to Chicago with Swartz, who introduced him to petitioner Gordon at the latter's "Liberal Loan" Jewelry Store. (R. 151-152.) Thereafter, the three men drove in Marshall's car to a spot where Gordon had his car parked, and then followed Gordon to a garage, the location of which was unknown to Marshall (R. 153-154). At the garage, a fourth man who "resembled [petitioner] MacLeod," drove an old truck with the name "White" on the side out of the garage and Marshall drove his car into the garage. Cases of Kodak film stacked therein were loaded into his car with the assistance of petitioners Gordon and MacLeod (R. 155-156). During the return trip, Swartz gave Marshall a list of the film obtained in Chicago, which Marshall after his arrest turned over to the F.B.I. (R. 158, Govt. Ex. 78). Marshall testified that on this date he and Swartz received 11 cases of 8 millimeter Kodachrome, 10 cases of roll Kodachrome and 13 cases of 116 film (R. 156, 191, 219). In Detroit, Swartz took one case of the 8 millimeter and one case of the 116 film (R. 157).

On July 27, 1950, Marshall and Swartz again drove to Chicago where they again met petitioner Gordon who gave Swartz an address in Marshall's presence (R. 165-166).² Swartz then directed Mar-

² Marshall testified that on July 22 he and Swartz obtained 10 or 11 cases of film from Gordon. (R. 161-163).

shall to drive to "215 East Erie" where they met petitioner MacLeod who identified himself as the "Ken" for whom they were looking (R. 167-169). Thereupon the three men walked to a garage adjacent to the property and petitioner MacLeod removed a truck from the garage which was the same one observed on the July 20 trip. Marshall drove his car into the garage where he and petitioner MacLeod loaded it with cases of film. (R. 169.) Marshall testified that on this date they obtained 20 to 24 cases of 8 millimeter Kodachrome Roll film and 5 or 6 cases of 16 millimeter Commercial film (R. 169, 170, 213, 218). Swartz took one case of the 16 millimeter film and several cases of the 8 millimeter rolls (R. 173).

After Marshall's arrest he turned over to the F.B.I. the film which he still had in his possession (R. 175, 231). Other film was recovered from Swartz and a customer to whom Marshall had sold film (R. 90, 239-240). Included therein was one full carton numbered 356 (Govt. Ex. 1, R. 483) and four empty cartons numbered 355, 357, 358 and 360,

³ In statements to the F.B.I., petitioners each admitted that they jointly owned the premises at 215 East Erie Street and the adjacent garage, but denied any knowledge that any stolen film was stored there (R. 260-261, 264-265, 270-273, 285-286). When he took the stand at the trial, petitioner Gordon testified that he refused to purchase film which Swartz wanted to sell him but that he gave Swartz the Erie Street address as a place to store film (R. 338-342). MacLeod testified that Gordon made arrangements for the parking of a truck in the garage, and that some days later a young man whose name he did not know requested him to open the garage. After cases had been unloaded from the truck, MacLeod backed the truck out to enable the man to drive in his car and load the back seat. (R. 357-365.)

respectively (Govt. Ex. 2-5, R. 483-484) of 16 millimeter Kodachrome film.

On August 14, 1950 in the Federal District Court, Detroit, Michigan, Marshall entered a plea of guilty of possession of the stolen film, but he had not been sentenced as of the date of testifying, May 31, 1951 (R. 175-176). On cross-examination, it was elicited that Marshall, shortly after his arrest on July 28, 1950, had signed a written statement (R. 194), which implicated Swartz but did not implicate either petitioner (R. 205). In response to petitioners' question the prosecutor stated that he did not have that statement in court (R. 194). Petitioners' demands for the production of this statement were denied (R. 195, 205). Marshall also testified that he had made several additional statements, each varying slightly from the others for the reason that he remembered some new detail (R. 206). However, not until August 25, 1950, after some four or five statements, and after his plea of guilty, did Marshall implicate petitioners Gordon and MacLeod (R. 205-207). Petitioners' motions for the production of each of the statements were denied by the trial court (R. 207).

Marshall maintained that he was not testifying by reason of any threats, hope, or promise of immunity (R. 197). Petitioners' counsel sought to question him respecting the circumstances surrounding his waiver of indictment and plea of guilty, specifically as to whether he had been advised in open court that his counsel and the prosecutor had discussed the disposition of the case in

chambers with the trial judge. After objection, the jury and Marshall were dismissed temporarily. (R. 198.) Petitioners then offered to prove that in open court the Detroit trial judge stated (R. 199):

Very well, the plea of guilty is accepted. Now, I am going to refer your case to the Probation Department for presentence report. I think I should say to you, as I said to your lawyer yesterday when he and Mr. Smith called upon me in chambers yesterday morning, that it seemed to me that if you intended to plead guilty and expected a recommendation for a lenient sentence or for probation from the Probation Department, that it would be essential that you satisfy the Probation Department that you have given the law enforcement authorities all the information concerning the merchandise involved in this proceeding.

Petitioners' counsel continued to quote the court as stating:

I am not holding out any promises to you, but I think you would be well advised to tell the probation authorities the whole story even though it might involve others.

This offer of evidence was denied admittance by the trial court (R. 200), the court stating that it had permitted cross-examination as to Marshall's motives, but regarded as immaterial the statements of the court in the Detroit case. Thereafter, before the jury, Marshall reiterated that he was not testifying by reason of any threats, hope or promise of

immunity (R. 197, 204, 221). He stated that his attorney had advised him not to testify (R. 204).

After the jury had been out for 11½ hours, at about 10:35 p.m., the trial judge advised counsel that he would give the jury a charge "as taken from *Allen v. United States*, 164 U.S. 492" (R. 445). The court stated that if the jury requested further instructions he would advise them that the instructions already given were sufficient to guide their further deliberations (R. 446). Over petitioners' objections, the supplemental instruction was given. It contained the following language (R. 446-447):

* * * Although the verdict to which each juror agrees must of course be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusions of his fellows, yet in order to bring 12 minds to an unanimous result, you must examine any questions submitted to you with candor and with a proper regard and deference to the opinions of others. You should consider that the case must at some time be decided; that you were selected in the same manner and from the same source from which any future jury must come, and there is no reason to suppose that the case will ever be submitted to 12 men and women more intelligent, more impartial or more competent to decide it, nor that more or clearer evidence will be produced on the one side or the other.

* * * But in conferring together you ought to pay proper respect to each other's

opinions and reasons with a disposition to be convinced with each other's arguments, and on the one hand if much the larger number of you are for a conviction, the dissenting jurors should consider whether the doubt in their own minds is a reasonable one which makes no impression on the minds of so many men and women equally honest, equally intelligent, and who have heard the same evidence with the same attention, and with an equal desire to arrive at the truth and under the sanction of the same oath. And, on the other hand, if the majority of you are for acquittal the minority should equally ask themselves whether they may not reasonably and ought not to doubt the correctness of the judgment which is not concurred in by a number of those with whom they are associated, and distrust the weight or sufficiency of that evidence which fails to carry conviction in the minds of their fellows.

An hour later, at the request of the jury foreman, a typewritten copy of the charge as given was sent to the jury room (R. 471). The jury delivered its verdict at 3:10 a.m. the following morning.

ARGUMENT

1. Petitioners contend that the trial court committed prejudicial error in unduly restricting the scope of their cross-examination of Marshall, key witness for the prosecution, in two respects (Pet. 10-15): first, in denying their motions for the production, inspection and use on cross-examination of the pre-trial statements made by Marshall to agents

of the F.B.I.; and secondly in denying their proffer of evidence respecting the events which occurred in another jurisdiction in connection with Marshall's plea of guilty there for his participation in the events about which he testified. It is, however, well settled that the extent of cross-examination in a criminal case rests in the sound discretion of the trial court, and in the absence of abuse, the exercise of that discretion is not reviewable. *Glasser v. United States*, 315 U.S. 60; *Alford v. United States*, 282 U.S. 687; *Chevillard v. United States*, 155 F. 2d 929 (C.A. 9); *United States v. Tandaric*, 152 F. 2d 3 (C.A. 7), certiorari denied, 327 U.S. 786. There was no abuse of discretion here.

During an extended and searching cross-examination of Marshall, it was shown that, following his arrest on July 28, 1950, by agents of the F.B.I., he made some four or five written statements concerning the details of his unlawful possession of the stolen film, but did not implicate either petitioner until the last statement given on August 25, 1950, after he had pleaded guilty before the District Court in Detroit for his part in the crime (R. 205-207). Each statement differed slightly from the prior statements for the reason, as Marshall testified (R. 206), that he made an additional statement each time he remembered something. However, he stated that the earlier statements were consistent with his present testimony (R. 205). He stated further that he never received a copy of any of the statements and had not seen them since making them (R. 210-211). Petitioners do not contend that

Marshall used the statements in testifying, or referred to them in court to refresh his recollection.⁴ Petitioners apparently sought the production of the statements for the purpose of impeaching Marshall by introducing prior inconsistent statements (R. 194, 205), but the fact of prior inconsistent statements was freely admitted by Marshall. The prosecutor stated that he did not have the statements with him and there was no reason to delay the trial to enable petitioners to prove a fact which was not disputed. In finding no abuse of discretion by the trial court on this matter, the Court of Appeals below aptly stated (R. 496-497):

- But, so far as the evidence discloses, there was no contradiction between the statements and his cross-examination. He was exhaustively cross-examined by two able counsel, and freely admitted that he did not name Gordon or MacLeod in the statements first made to the F.B.I. Had they been produced, showing in this respect, the very fact to which he testified, they would not have amounted to impeachment and would not, therefore, have been admissible.

⁴ In *Goldman v. United States*, 316 U.S. 129, 132, this Court stated: "We think it the better rule that where a witness does not use his notes or memoranda in court, a party has no absolute right to have them produced and to inspect them. Where, as here, they are not only the witness' notes but also part of the Government's files, a large discretion must be allowed the trial judge." See also *Little v. United States*, 93 F.2d 401 (C.A. 8), certiorari denied, 303 U.S. 644, where the court held the defendants not entitled to production and inspection of written statements mentioned in the Government witness' testimony, where the witness did not use the statements in testifying.

The second facet of petitioners' contention (Pet. 10-15) is that they were not permitted to introduce evidence of the statement by the District Judge at the time Marshall entered his plea (see Statement, *supra*). The court below in an exhaustive review of this matter (R. 497-500) noted that Marshall on cross-examination was "interrogated at length concerning any promises of reward, leniency or consideration" (R. 497). Marshall steadfastly maintained throughout that he was not testifying because of any threats, hope, or promise of immunity (R. 197, 204, 221). The record shows clearly that the jury had before it in the case at bar Marshall's plea of guilty in Detroit, the fact that he had not yet been sentenced, and that he did not, at first, involve petitioners (R. 175, 197, 198, 204, 221). The statement volunteered by the District Judge in Detroit added nothing to the possible implications from these facts. Accordingly, as the court below observed, the jury "had before it his own admissions in that respect and nothing in the transcript disputed them or added anything of substance thereto" (R. 499).

2. Petitioners contend (Pet. 15-16) that the trial court's initial instructions to the jury were prejudicial in that the court's usage of the term "either or both of the defendants" throughout certain portions of the charge (R. 431-433) admonished the jury, in essence, that a finding against one petitioner would justify a finding against both. Objections to these instructions were taken and overruled (R. 440). In addition, although they did not

object at the time,⁵ (R. 440-442) petitioners argue here, as in the court below, that the trial court also erred in using the phrase "or either of them" in its instruction concerning the presumption of innocence (R. 434-435). A careful reading of this portion of the charge, as a representative example of the type of error complained of, will readily demonstrate the lack of merit in petitioners' argument. Thus, the trial court charged (R. 434-435):

Now, the defendants in this, as in every other criminal trial, come to court presumed to be innocent, and that presumption protects them until such time as when the jury shall believe from the evidence beyond a reasonable doubt that the defendants, *or either of them*, is guilty as charged in the indictment.

* * * and you cannot find the defendants *or either of them* guilty unless from the evidence you believe *such defendant or defendants* guilty of the offenses charged in the indictment; or some one of the offenses charged in the indictment, beyond a reasonable doubt.
 •[Emphasis added.]

From the language italicized above, it is clear that the court advised the jury that two separate defendants were on trial and the fact of their individual guilt or innocence was for the jury to decide. Moreover, in determining whether a charge is erroneous or prejudicial, it is not enough

⁵ See Rule 30, F. R. Crim. P.

to consider isolated phrases out of context. The charge must be viewed as a whole and the portions complained of placed in proper setting. See *Boyd v. United States*, 271 U.S. 104, 107-108; *United States v. Kaadt*, 171 F. 2d 600 (C.A. 7); *Moffitt v. United States*, 154 F. 2d 402 (C.A. 10), certiorari denied, 328 U.S. 853; *Eastman v. United States*, 153 F. 2d 80 (C.A. 8), certiorari denied, 328 U.S. 852. The judge specifically charged (R. 433-434):

Now, there are two defendants before you for trial. The guilt or innocence of the defendants is to be determined separately, and as to each defendant, only that evidence which was admitted by the Court against the respective defendant is to be considered in determining his individual innocence or guilt.

3. There is no substance to petitioners' contention (Pet. 17-19) that the trial court committed prejudicial error in sending to the jury written copies of both the initial and supplemental charges without notice to counsel and without petitioners or their counsel being present, and in giving a supplemental charge similar to that approved in *Allen v. United States*, 164 U.S. 492.

At 3:00 p.m., about four hours after the jury had retired, the trial judge, in accordance with his regular practice, sent the jury a transcript of his oral charge, prepared by the Court Reporter (R. 470-471). Counsel for petitioners stated as a matter of record that they were unaware of this practice and had no actual notice that the transcript was to go to the jury or that it did go (R. 470-474).

After giving the *Allen* charge, at the request of the jury, the judge also sent in a copy of his supplemental charge without notifying counsel (R. 471).

It is well settled that the trial court, acting in its discretion, may permit the jury to have written instructions with them in the jury room. See *Copeland v. United States*, 152 F. 2d 769, 770 (C.A. D.C.), certiorari denied, 328 U.S. 841; *Outlaw v. United States*, 81 F. 2d 805, 808-809 (C.A. 5), certiorari denied, 298 U.S. 665. Here, the transcript contained only that which had earlier been delivered orally. It was transcribed by the Court Reporter, examined by the trial court for accuracy, and then delivered to the jury (R. 471). Since opportunity had previously been afforded petitioners to object to the charge (R. 440), nothing would be gained by again submitting the same charge to them. This was not a fresh communication to the jury, as in *Fillipon v. Albion Vein Slate Co.*, 250 U.S. 76, 81, relied upon by petitioners (Pet. 18). Here there was merely the delivery of the charge as given reduced to writing. Accordingly, the absence of petitioner and counsel could not be prejudicial error.

As to the *Allen* charge, petitioners contend that the statement (R. 446-447):

* * * you must examine any question
* * * with candor and a proper regard and
deference to the opinions of others.

was erroneous in that it "could have caused the jury to believe after many hours of argument and

continued confinement that the opinions of the press, the witnesses, Judge, prosecutor and general public should be considered" (Pet. 18). Again we submit that the charge must be read as a whole, and not in isolated phrases. *Boyd v. United States*, 271 U.S. 104, 107-108; *United States v. Kaadt*, 171 F. 2d 600 (C.A. 7); *Moffitt v. United States*, 154 F. 2d 402 (C.A. 10), certiorari denied, 328 U.S. 853; *Eastman v. United States*, 153 F. 2d 80 (C.A. 8), certiorari denied, 328 U.S. 852. The judge subsequently said "in conferring together you ought to pay proper respect to each other's opinions and reasons with a disposition to be convinced with each other's arguments" (R. 447). When the charge is thus considered as a whole (R. 446-447), it becomes obvious, as the court below observed, that (R. 500-501):

The charge made it crystal clear that the jurors should consider the opinions of each other and make every reasonable effort possible to reconcile any differences. They were advised that it was their convictions, *i.e.*, those of each of the panel, based upon the evidence, which should control and that the opinions of no witness and of no counsel was of the slightest importance or relevance. They could not have possibly been misled.

The trial court's admonition that the case "must at some time be decided" did, admittedly, represent a departure from the usual language. However, the trial court did expressly explain that it was the jury's duty to decide the case, only if they

could conscientiously do so (R. 447). And read in the light of the charge as a whole, we submit that the error, if any, was harmless. See Rule 52(a), F. R. Crim. P.

4. Petitioners contend that as to counts 2 and 4, the Government failed to prove that the stolen film was of the requisite jurisdictional value of \$5,000 or more (Pet. 19-20). However, Marshall testified as to the amount transported. (see Statement, *supra*) and the General Traffic Manager of Eastman Kodak testified as to retail (R. 32-34) and wholesale prices as set forth in the official Eastman price list (R. 52-53, 63). On either basis the amount of the film transported was shown to have been considerably in excess of \$5,000.⁶ The fact that the film carried with it a right to have a roll developed does not detract from the retail or wholesale price since the right attaches to the film and obviously has value.

Since the verdict was general, the court below found it unnecessary to discuss petitioners' re-

⁶ The following table summarizes the testimony:

Quantity Transported	Type	July 20 Price per carton		Total	
		Retail	Wholesale	Retail	Wholesale
10	8 mm Kodachrome Roll	\$410.00	\$270.00	\$4,100.00	\$2,700.00
11	8 mm Kodachrome	252.50	164.50	2,777.50	1,809.50
13	116 Verichrome	147.00	90.00	1,911.00	1,170.00
	Total Value			\$8,788.50	\$5,679.50
July 27					
20 to 24	8 mm Kodachrome Roll	\$410.00	\$270.00	\$8,200.00	\$5,400.00
				to	to
				9,840.00	6,480.00
5 or 6	16 mm Commercial Kodachrome	367.50	367.50	1,837.50	1,837.50
	(Sold direct R. 45-47)			to	to
				2,205.00	2,205.00
	Total Value			\$10,037.50	\$7,237.50
				to	to
				12,045.00	8,685.00

maining contention that counts one and three would not sustain sentences for more than a year because the counts contained no allegation of value. As to those counts, value goes only to the punishment and not to the offense. The offense is possession of property known to have been stolen from an interstate shipment. Only if the stolen property is of less than \$100 in value is the offense punishable as a misdemeanor. Hence the failure to allege value does not invalidate the indictment. And since the offense was shown to relate to property having a value of more than \$100, the judgment may properly be sustained on counts one and three, as well as counts two and four.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

**KENNETH C. GORDON AND KENNETH J. MACLEOD,
PETITIONERS**

v.

UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 182

KENNETH C. GORDON AND KENNETH J. MACLEOD,
PETITIONERS

v.

UNITED STATES OF AMERICA

WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 493-01) is reported at 196 F.2d 886.

JURISDICTION

The judgment of the Court of Appeals was entered on May 14, 1952 (R. 502), and a petition for rehearing was denied on June 7, 1952 (R. 503). A petition for certiorari was filed on July 7, 1952, and was granted on October 13, 1952, as to two of the six

questions presented (R. 508). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b) (2) and (45a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether it was an abuse of discretion, in the circumstances of this case, for the trial court to limit cross-examination of the Government's key witness, by denying petitioners' motions for the production and inspection of certain pre-trial statements, made by the witness to FBI agents, which were inconsistent with his testimony at the trial.

2. Whether it was an abuse of discretion, in the circumstances of this case, for the trial court to limit cross-examination of this witness by refusing to admit comments of a trial judge in another jurisdiction before whom the witness had previously pleaded guilty for participation in the same crime.

STATUTES INVOLVED

18 U.S.C. (Supp. V) 659 provides in pertinent part:

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle * * *;
or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen;

* * * * *

Shall in each case be fined not more than \$5,000 or imprisoned not more than ten years,

or both; but if the amount or value of such money, baggage, goods or chattels does not exceed \$100, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

18 U.S.C. (Supp. V) 2314 provides in pertinent part:

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud;

* * * * *

Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

STATEMENT

On December 1, 1950, in the District Court for the Northern District of Illinois, a four-count indictment (R. 3-5) was filed against petitioners and one Albert Swartz, since deceased.¹ Count 1 charged that on July 20, 1950, petitioners unlawfully, wilfully and knowingly had in their possession Kodak Film which had been stolen from a common carrier while moving in interstate commerce from Rochester, New York, to Chicago, Illinois, in violation of 18 U.S.C. 659. Count 3 charged a similar offense on July 27, 1950. Count 2 charged petitioners with causing the property described in

¹ On May 28, 1951, the charges against Swartz were dismissed on the Government's motion (R. 15-16).

Count 1, of a value of more than \$5,000, to be transported in interstate commerce from Chicago, Illinois, to Detroit, Michigan, in violation of 18 U.S.C. 2314. Count 4 charged a similar offense on July 27, 1950. After a jury trial, petitioners were found guilty and sentenced to ten years' imprisonment (R. 466-468). On appeal, the judgments of conviction were unanimously affirmed (R. 493-501).

At the trial the following evidence was adduced:

On July 8, 1950, a trailer of the Interstate Motor Freight System was loaded at Rochester, New York, with cartons of Eastman Kodak film for shipment to Eastman at Chicago (R. 79-80, 81-84). Heavy waterproof paper was placed around the merchandise for protection, and the trailer doors were sealed shut (R. 22, 81). The bill of lading for the shipment (Gov. Ex. 67, R. 87), and Eastman Kodak packing records (Gov. Ex. 76, R. 150), listed cartons numbered 355 through 360 as included in the shipment.

The trailer arrived in Chicago early in the morning of July 10, 1950, apparently in good condition (Gov. Ex. 70 R. 128; see also R. 93-95). On July 11, when a driver for the Interstate company went to get the trailer for delivery to Eastman, he found the seals broken and torn paper on the ground (R. 105-111). (See also R. 92-104, 113-127.) The FBI was notified (R. 275) and the trailer was then delivered to the Eastman plant in Chicago, where it was unloaded (R. 130).

A comparison of the goods received (Gov. Ex. 75,

R. 150) with the goods shipped as shown by the original bill of lading (Gov. Ex. 67, R. 87), established that the shortage consisted of:

91 cartons	8 mm Kodachrome Roll
14 cartons	8 mm Kodachrome magazine
13 cartons	116 Verichrome Kodak
6 cartons	16 mm Commercial Kodachrome

Included in the cartons found to be missing were the cartons numbered 355 through 360, inclusive, containing 16 mm Commercial Kodachrome film.

James I. Marshall who had been arrested in Detroit on July 28, 1950, on a charge of possessing some of the missing film, appeared as a witness for the Government. He testified that on July 20, 1950, he drove from Detroit to Chicago with Albert Swartz, who introduced him to petitioner Gordon at the latter's jewelry store (R. 151-152). Thereafter, the three men drove in Marshall's car to a place where Gordon picked up his car and drove it away (R. 153-154). Marshall and Swartz followed Gordon to a garage, from which, on their arrival, a truck was removed by a fourth man who "resembled [petitioner] MacLeod." Marshall drove his car into the garage and with the help of petitioners proceeded to load cases of Kodak film stacked therein into his car. (R. 155-156.) During the return trip, Swartz gave Marshall a list of the film obtained in Chicago, which Marshall after his arrest turned over to the FBI (R. 158, Govt. Ex. 78). Marshall testified that on this date he and Swartz received 11 cases of 8 millimeter Koda-

chrome, 10 cases of roll Kodachrome and 13 cases of 116 film (R. 156, 191, 219). In Detroit, Swartz took one case of the 8 millimeter, one case of the roll Kodachrome, and one of the 116 film (R. 157).

On July 27, 1950, Marshall and Swartz again drove to Chicago where they met petitioner Gordon who instructed them to drive to 215 East Erie Street and ask for Ken (R. 165-167). They proceeded as instructed and met petitioner MacLeod who identified himself as the "Ken" for whom they were looking (R. 167-169). Thereupon, the three men walked to a garage adjacent to the property and petitioner MacLeod again removed the truck. Once again Marshall drove his car into the garage, and, with MacLeod's help, loaded it with cases of film (R. 169). Marshall and Swartz then returned to Detroit (R. 172). Marshall testified that on this date they obtained 20 to 24 cases of 8 millimeter Kodachrome roll film and 5 or 6 cases of 16 millimeter film (R. 169, 170, 213, 218). Swartz took one case of the 16 millimeter film and several cases of the 8 millimeter rolls (R. 173).

Corroboration, in part, of the story told by Marshall was supplied by the testimony at the trial of several FBI agents. Thus, an FBI agent testified that on July 27, 1950, he observed the following: A car pulled into an alley at 215 East Erie Street, and the driver, subsequently identified as Marshall, went into the building, returning in a minute or two with petitioner MacLeod. Marshall then drove his car before the door of a garage at the same address, which was opened by MacLeod, who then drove an old Chevrolet truck marked

"F. White" from the garage into the alley. As Marshall backed his car into the garage, a passenger in Marshall's car, subsequently identified as Albert Swartz, stood by in the alley. After about five or ten minutes, Marshall and Swartz drove off, the back seat of the car full of cartons marked "Kodak." (R. 276-278.)²

Other FBI agents testified that on July 27, 1950, they had seen Marshall and Swartz at various points en route from Chicago back to Detroit (R. 306-307, 309, 318).

After Marshall's arrest he turned over to the FBI the film which he still had in his possession (R. 175, 231). Other film was recovered from Swartz and a customer to whom Marshall had sold film (R. 90, 239-240). Included therein was one full carton numbered 356 (Gov. Ex. 1, R. 483) and four empty cartons numbered 355, 357, 358 and 360, respectively (Gov. Ex. 2-5, R. 483-484), of 16 millimeter Kodachrome film.

This case is before the Court because of a series

² In statements to the FBI, petitioners admitted that they had joint interest in the premises at 215 East Erie Street and the adjacent garage, but denied any knowledge that any stolen film was stored there (R. 260-261, 264-265, 270-273, 285-286). When he took the stand at the trial, petitioner Gordon testified that he refused to purchase film which Swartz wanted to sell him but that he gave Swartz the Erie Street address as a place to store film (R. 338-342). MacLeod testified that Gordon made arrangements for the parking of a truck in the garage, and that some days later a young man whose name he did not know requested him to open the garage. After cases had been unloaded from the truck, MacLeod backed the truck out to enable the man to drive in his car and load the back seat. (R. 357-365.)

of rulings made by the trial judge during the cross-examination of the Government's principal witness, Marshall.

At the close of the first day of cross-examination of Marshall, it was elicited that he had given a signed statement to the FBI shortly after his arrest on July 28, 1950. Counsel for each petitioner, on being apprised that the Government did not have this statement in court, made requests for its production. Both requests were denied. (R. 194-195.)

When cross-examination was resumed the following day, the witness was asked how many statements he had made to the FBI subsequent to his arrest. Objection to this question was sustained. (R. 196.)

The cross-examiner then elicited from Marshall that he had next appeared before the FBI on August 25, which was a week after he had pleaded guilty before a Detroit judge on a charge growing out of his possession of the stolen film (R. 197). Following this, Marshall was asked a number of questions directed at ascertaining whether he had been promised any immunity for his testimony or had any hope of getting consideration in his Detroit case by virtue of his testimony against petitioners in this trial. To all these questions, Marshall replied in the negative. (R. 197-198.) Counsel then sought to introduce an excerpt from the transcript of the Detroit proceeding, because, according to counsel, it was "the basis for part of his motive for testifying" (R. 199). Out of the presence and hear-

ing of the jury, Mr. Callaghan, counsel for petitioner Gordon, read from the transcript, as follows (R. 199):

The Court: Very well, the plea of guilty is accepted. Now, I am going to refer your case to the Probation Department for presentence report. I think I should say to you, as I said to your lawyer yesterday when he and Mr. Smith called upon me in chambers yesterday morning, that it seemed to me that if you intended to plead guilty and expected a recommendation for a lenient sentence or for probation from the Probation Department, that it would be essential that you satisfy the Probation Department that you have given the law enforcement authorities all the information concerning the merchandise involved in this proceeding.

* * * * *

As I understand it, there was a tremendous amount of film involved,"

* * * * *

and it is very important for the law enforcement authorities to apprehend all of those who participated in this rather large theft from the interstate commerce shipment.

I am not holding out any promises to you, but I think you would be well advised to tell the probation authorities the whole story even though it might involve others.

The Defendant: Yes, sir. I told Mr. Sherry everything I knew, and I tried to be very cooperative.

Following this reading, Mr. Walsh, counsel for petitioner MacLeod, reiterated that the statement of the Detroit judge should be admitted to show "whether or not this man has a motive that is prejudicial to these persons." Objection to introduction of this statement was sustained, in part, on the ground that numerous questions relating to the witness' motive had already been permitted (R. 200).

Subsequently, the subject of the witness' motive was resumed, as follows (R. 204):

Q. And you have no hope of immunity or reward for the testimony you are now giving in this court room?

A. No, sir.

Q. Did any person whomsoever suggest to you that if you cooperated with the authorities in this case and testified against others, you would receive consideration?

Mr. Downing: I object, your Honor. This has been gone into before.

The Court: He may answer.

By the Witness:

A. No, sir, my lawyer told me not to testify.

Counsel then returned to the witness' prior statements to the FBI. After the witness admitted that he had not named petitioners in his first statement, counsel again requested its production. The request was denied, but questioning as to the alleged inconsistency was allowed to continue. (R. 205.) In the course of this questioning it was brought out that the witness had first implicated

petitioners five weeks after his first statement, which was one week after he, himself, had pleaded guilty in Detroit (R. 205).

Counsel then continued to question the witness concerning his prior statements to the FBI, and elicited that he had made four or five statements in all, and that each had varied somewhat as the witness recalled some new detail each time he told his story (R. 206). Counsel's request for the production of all these statements was denied (R. 207).

At the close of the trial, the court made the following charge with respect to the care to be used in evaluating the testimony of an accomplice-witness such as Marshall (R. 437):

Under the instruction which I have given you heretofore; you should scrutinize carefully the testimony of any witness who, as a Government witness, incriminates himself with others in the offense charged. The evidence of such a witness ought to be received with the very greatest care and caution, and subject to the same rules which I have given you governing other witnesses.

The law is that the jury shall consider the testimony of an accomplice and may, if the evidence warrants, find the defendant guilty upon the testimony of any accomplice alone. However, before you would be justified in arriving at a verdict upon the uncorroborated testimony of the witness Marshall alone, you should find his testimony to be clear and convincing, and to possess the characteristics of

truth, and together with all other evidence in the case, convince you beyond a reasonable doubt.

On appeal, the Court of Appeals for the Seventh Circuit affirmed the petitioners' convictions. As to the questions here presented, that court held that the trial court had not abused his discretion; that the prior inconsistent statements would not have amounted to impeachment of the witness, as his testimony admitted that in those statements he had not implicated the petitioners; that the statement of the Detroit judge did not contain "anything of substantial interest to defendants beyond what had been brought out in Marshall's cross-examination"; "that the failure to admit the transcript could [not] in the slightest degree, have prejudiced the jury which had before it the undisputed facts in this respect"; that it was not "abuse of the discretion" or "prejudicial error" for the trial court to exclude the transcript. (R. 493-501.)

SUMMARY OF ARGUMENT

I

The controlling principles for the decision of the present case were given recent and explicit expression in *Michelson v. United States*, 335 U.S. 469. This Court there held, in substance, that the scope of allowable cross-examination was a matter primarily for the discretion of the trial judge.

The considerations underlying that decision do not depend on the particular factual situation or rule of evidence there involved. Matters of the

orderly administration of a trial depending, in turn, on assessment of "numerous and subtle considerations difficult to detect or appraise from a cold record * * *" will ordinarily be left to trial court discretion absent "a clear showing of prejudicial abuse of discretion." *Michelson v. United States*, *supra*, 335 U.S. at 480. Compare *United States v. Socony-Vacuum Co.*, 310 U.S. 150, 231-237; *Glasser v. United States*, 315 U.S. 60, 83; *Alford v. United States*, 282 U.S. 687, 694.

The efficient and, in the long run, the only proper administration of the federal court system is to rest in the trial courts the utmost of discretion. No amount of rigid appellate supervision and review can or should substitute for effective district courts. Particularly in the area of rulings on the admissibility of evidence is it essential that the trial judge be allowed to rule rapidly as the needs of the trial appear to demand. He should not be restrained by the fear that if perchance he slightly errs, the entire proceeding will be reversed. In this case, the two questions presented both involve supposed errors in the rulings of the trial judge which excluded certain evidentiary materials. The fact that either of those questions may appear to an appellate court to have been incorrectly decided does not warrant reversal. As the Court of Appeals below held, this record does not support the charge of abuse of discretion.

II

Denial of the production and inspection of allegedly inconsistent statements of the government

witness, Marshall, was not, in the circumstances of this case, such a clear abuse of discretion as to warrant reversal by this Court.

A. The fact of contradiction was clearly in the record, and was emphasized on several occasions (R. 205, 207). It was known that Marshall had not implicated petitioners, Gordon and MacLeod, until his fifth statement to the F.B.I. (R. 207), and that this statement followed his plea of guilty (R. 197). It was known also that in his first statement Marshall had said that he got the film from Swartz (R. 205).

It was thus apparent that at some point, Marshall was either in error or had lied. The addition of the statements could not have made this clearer.

B. Consideration of the basic purposes for which prior contradictory statements are admitted, to show want of intelligence, memory, or honesty, underlines the conclusion that these purposes are normally satisfied, and in the circumstances of this case, are satisfied, by the showing of the fact of contradiction. See 3 Wigmore, *Evidence* (3d ed. 1940) §§ 1017, 1037.

Although there is dispute in the state courts on this issue, the federal cases clearly support the view that a trial court may, in the exercise of its discretion, exclude prior contradictory statements after proof of the fact of contradiction. See, e.g. *Boehm v. United States*, 423 F. 2d 791 (C.A. 8), certiorari denied, 315 U.S. 800; *United States v. Muraskin*, 99 F. 2d 815 (C.A. 2). Review of the bases of those exercises of discretion demonstrates that the considerations apparent in the

present record bring the questioned rulings well within the normal exercise of discretion.

The decision of the Court of Appeals for the Second Circuit in *United States v. Krulwitch*, 145 F. 2d 76, is said to be contrary. But in that case the court had to deal both with a witness who was extremely erratic and also with a prior statement by that witness which expressly and completely exculpated the defendant. The requirement of that case that as full a showing as possible of matters bearing on the credibility of such a witness be permitted may be accepted without concluding that in the present case more than a showing of the contradictions itself was necessary.

C. The fact that the issues arose on a motion to produce does not alter the problem. The trial judge has a "large discretion" with respect to the production of documents. *Goldman v. United States*, 316 U.S. 129, 132; cf. *United States v. Socony-Vacuum Co.*, 310 U.S. 150.

Although there is some support for the view that it would have been better practice for the trial court to have examined the statements before denying petitioners' motions, the fact that petitioners did not request this, or request that they be made part of the record for purposes of review precludes the assertion of this failure to support their argument that the trial court abused its discretion. See *United States v. Rosenfeld*, 57 F. 2d 74, 76 (C.A. 2), certiorari denied, 286 U.S. 556; *United States v. Ebeling*, 146 F. 2d 254, 256-257 (C.A. 2).

The refusal of the trial court to admit the statement of the Detroit judge to Marshall was not, in the circumstances of this case, such a clear abuse of discretion as to warrant reversal by this Court. There is, in our view, a more serious question of abuse of discretion on this point than in the point discussed in Point II, *supra*. We believe, however, that there is support for the position that even here the trial judge did not abuse the discretion accorded him in matters of cross-examination.

A. The admission of the statement would not have made available to the jury any facts that were not otherwise available to them. It was called to the jury's attention on at least three separate occasions, both on the Government's case in chief and on rebuttal, that Marshall had pleaded guilty in Detroit and that he was unsentenced there. (R. 210, 221, 422.) It was pointed out that over nine months had passed since the time of sentencing, and that not even a date was set for sentencing (R. 210). In these circumstances it was not unreasonable for the trial judge to conclude that this sufficiently showed Marshall's motive to lie.

B. The trial judge, moreover, could reasonably have excluded the Detroit statement to avoid complicating the trial. When the statement was viewed in the light of what both Marshall and the Detroit judge knew, it was clearly not a special inducement for Marshall to lie with respect to the participation of the petitioners. But unless these factors were emphasized, the statement could have

been given a misleading emphasis before the jury. To prevent this might have required the reception of evidence or a detailing of argument which would simply have diverted attention from the main issues.

Whether the trial judge was right or not if he in fact anticipated these complications, it is the kind of immediate forejudgment which it is the special business of trial judges to make. In the circumstances of this case, it was not unreasonable.

When this consideration is weighed with the equally reasonable judgment of the trial court that the subject matter of Marshall's bias was sufficiently shown (see R. 200), his exercise of discretion to exclude the statement seems clearly correct.

C. The cases which have dealt with limitations on the scope of cross-examination draw a sharp distinction between cutting off all examination on a particular subject matter, and merely cutting off the amount or kind of proof. See *Alford v. United States*, 282 U.S. 687. Practically all of the cases holding that there has been abuse of discretion have been of the former type. Decisions sustaining exercises of discretion with respect to the latter type clearly encompass the considerations relied upon in the instant case.

D. Both as to the exclusion of the statement of the Detroit judge and as to the refusal of the district court to grant the motion to produce the prior inconsistent statements, discussed in Point II, pp. 13-15, *supra*, the judge's charge to the jury in

large measure satisfied even petitioners' complaints of abuse of discretion in excluding the evidence. This factor of the rectifying power of the judge, as to matters which have occurred at the trial, in his charge to the jury, accentuates the necessity of allowing trial judges great latitude, particularly in matters of cross-examination.

ARGUMENT

I

The Issue in This Case Is Solely Whether the Trial Court Has Abused Its Discretion

The trial court refused to admit the two contested items of evidence in this case apparently because it thought that this evidence would not add significant force to evidence of record in support of the contention that Marshall, the principal government witness, was not credible. Simply as an aspect of its power to control the amount and kind of proof, the trial court decided that this evidence should not be admitted.³

The controlling principles for the decision of the issue thus presented were given recent and explicit recognition in *Michelson v. United States*, 335 U.S. 469. This Court there held, in substance, that the scope of allowable cross-examination is a matter

³ The Government's contention with respect to the Detroit judge's statement was that it was immaterial (R. 200). The court's ruling indicates that it thought also that the subject of Marshall's bias had been sufficiently developed (R. 200). The motions for production of the allegedly inconsistent statements were denied without Government objection (R. 205, 207). No attempt was made to exclude either item of evidence by any claim of incompetency or governmental privilege.

primarily for the discretion of the trial judge.

Michelson involved a prosecution for bribery of a federal revenue agent. The determination of guilt turned solely on whether the principal government witness or the defendant was believed. 335 U.S. at 471. To support his case, the defendant had produced witnesses who testified to his good reputation. On cross-examination, and over defendant's objection, the trial court permitted the Government to ask these witnesses whether they were aware that the defendant had been arrested for receiving stolen goods some 30 years previously.

This Court held that the admission of this evidence by the trial court was an allowable exercise of discretion. The Court made clear that the considerations governing the admission or exclusion of this evidence were peculiarly appropriate for trial court disposition. It emphasized also that the area of allowable discretion was very wide. It stated (335 U.S. at p. 480) that:

Both propriety and abuse of hearsay reputation testimony, on both sides, depend on numerous and subtle considerations difficult to detect or appraise from a cold record, and *therefore rarely and only on clear showing of prejudicial abuse of discretion will Courts of Appeals disturb rulings of trial courts on this subject.* [Emphasis added.]

It is clear that the principles on which the *Michelson* case relies do not depend on the particular kind of evidence involved in that case. The question whether, in all the circumstances of the *Michelson*

case, it conduced to a fair trial of Michelson's guilt to permit reputation witnesses to be asked about an arrest made 30 years previously is not in principle different from most questions which will arise in controlling the scope of cross-examination, nor from the questions here in issue. In any such instance, the answer will depend, among other things, on the direct or collateral nature of the inquiry, the extent to which the inquiry is repetitious, the extent to which the inquiry involves special risks of prejudice, or the extent to which the inquiry complicates the issues to be understood by the jury. In short, *Michelson* is, on its facts, illustrative of those cases where the significance of a fact offered for proof depends "on numerous and subtle considerations difficult to detect or appraise from a cold record * * *." Consequently, its holding that in such situations, the trial court's discretion will be upheld absent "a clear showing of prejudicial abuse of discretion" must be of general applicability, 335 U.S. at 480.⁴ Compare, for similar applications of the same basic principle, *United States v. Socony-Vacuum Co.*, 310 U.S. 150, 231-237; *Glasser*

⁴ The Court's view in *Michelson* that matters relating to the fair conduct of the trial should be left largely to the trial court is emphasized by another aspect of the case. The Court's opinion shows that it was obviously not satisfied with the good sense or fairness of rules which permitted reputation witnesses to be asked on cross-examination whether they knew of specific crimes with which the defendant had been charged. Evidence of that sort could not have been introduced directly; and it required a limiting instruction that it was to be used only to test the extent of the reputation witness' knowledge.

Both the appellate court and the dissent of Mr. Justice Rutledge vigorously urged alternative rules which they considered fairer, and which would have limited cross-examination of

v. *United States*, 315 U.S. 60, 83; *Alford v. United States*, 282 U.S. 687, 694; *United States v. Freundlich*, 95 F. 2d 376, 379 (C.A. 2); 3 Wharton, *Criminal Evidence* (11th ed.) § 1308; cf. *United States v. Johnson*, 327 U.S. 106.

It is not and cannot be the business of this Court to conduct trials. That must be the business of trial judges. This Court recognized that fact in *Michelson*. A printed record is an inadequate substitute for the on-hand and immediate sense of the needs of the trial. The trial judges must be allowed a wide discretion with respect to issues such as those now before this Court. And discretion, if it is to have any meaning at all, means a discretion to make rulings which, on the record, may appear to the reviewing court to be mistakes. Cf. 1 Wigmore, *Evidence* (3d ed. 1940) pp. 249-250.⁵

reputation witnesses either to questions about crimes similar in nature to that for which the defendant was on trial, or, alternatively, to testimony that the defendant's reputation was not good. See 165 F. 2d 732, 735, n. 8 (C.A. 2); 335 U.S. at 496.

But even in the face of its own reservations, the Court declined to adopt any rigid rule of exclusion. See especially, 335 U.S. at 486. It is true that the Court also expressed a reluctance to tinker piece-meal with what seemed to it to be one aspect of a fairly well established rule of evidence. But such reluctance was obviously related to the fact that the established rule permitted trial court flexibility.

⁵ "True enough, Supreme Courts are frequently found declaring that the application of a rule was in the trial Court's discretion, unless that discretion was abused. But mostly, we regret to note, this expression is . . . mere palaver. For the Supreme Court then goes on to examine elaborately the trial Court's ruling, and, as likely as not, reverses it. In other words, it is often an 'abuse of discretion' not to agree with the Supreme Court, if the latter on its lesser information takes the opposite view. The Supreme Judicial Courts of Massachusetts and of New Hampshire, on many rules, do faithfully relegate their application to the trial judge. In no other Supreme Court is any such habitual attitude noticeable." 1 Wigmore, *supra*, at 250.

The efficient and, in the long run, the only proper administration of the federal court system is to rest large discretion in trial courts. No amount of rigid appellate supervision and review can or should substitute for effective district courts. Particularly in the area of rulings on the admissibility of evidence, it is essential that the trial judge be allowed to rule rapidly as the needs of the trial appear to demand. He should not be restrained by the fear that if perchance he slightly errs, the entire proceeding will be reversed. In this case, the two questions presented both involve supposed errors in the rulings of the trial judge which excluded certain evidentiary materials. The fact that either of those questions may appear to an appellate court to have been incorrectly decided does not warrant reversal. As the Court of Appeals below held, this record does not support the charge of abuse of discretion.

The words of Mr. Justice Frankfurter, concurring in *Michelson*, neatly emphasize the undesirability of inflexible limitations on the allowable scope of cross-examination (335 U.S. at 487-488):

To leave the District Courts * * * the discretion given to them by this decision presupposes a high standard of professional competence, good sense, fairness and courage on the part of the federal-district judges. If the United States District Courts are not manned by judges of such qualities, appellate review, no matter how stringent, can do very little to make up for the lack of them.

Denial of Production and Inspection of Marshall's Allegedly Inconsistent Prior Statements Was Not, in the Circumstances of This Case, Such a Clear Abuse of Discretion as to Warrant Reversal by This Court

A. The evidence indicates that the production of Marshall's statements would not have made available to the jury any facts that were not otherwise available to them.

The first alleged abuse of discretion concerns the trial court's denial of the various motions for the production of statements which had been made by the government witness, Marshall, prior to the statement in which he first implicated petitioners.

Petitioners' first motions directed to the production of the statements were based merely on the theory that a statement had been made which was in the hands of the F.B.I. These motions were denied (R. 194-195). In further development of cross-examination, it was brought out that Marshall had had a number of conferences with the F.B.I., and had made four or five statements between the time of his arrest, on July 28, 1950, and his statement of August 25, 1950, when for the first time, he implicated petitioners, Gordon and MacLeod (R. 205-207).

At least three times during cross-examination, Marshall admitted that in the first four statements he had given to the F.B.I. he had failed to implicate petitioners. The appropriate portions of the record read as follows:

Q. Now, in the first statement you made to Mr. Sheer, you didn't name Kenneth Gordon, did you?

A. No, sir.

Q. And you didn't name Mr. MacLeod in that statement, did you?

A. I don't believe so. [R. 205.]

* * * * *

Q. But you didn't name Gordon, and you didn't name MacLeod? Did you?

A. There wasn't anybody—

Q. Wait a minute, you didn't name Gordon, and you didn't name MacLeod, did you?

A. No, sir.

Q. Now, how long after this first statement you made in July, was it before you ever mentioned the name of Gordon or MacLeod to anybody?

A. August 25th. [R. 205.]

* * * * *

Q. Between July 18 and August 25, you made five statements in writing, and signed each one, is that right?

A. I told you, I believe so.

Q. I didn't hear you?

A. I believe so.

Q. And it wasn't until August 25 that you ever mentioned the name of Gordon and MacLeod?

A. That is correct. [R. 207.]

In addition, Marshall had admitted that in his first statement he said he got the film from Swartz

(R. 205). And facts had been developed to show that his final statement had come only after his own plea of guilty in Detroit (R. 197).

The trial judge did not detail his reasons for preventing petitioners' attempts to show by the F.B.I. statements that Marshall had contradicted himself. But it is clear that the fact of contradiction had been shown in considerable detail; and that consequently the court could reasonably have thought that inspection and presentation of the documents could not sufficiently have advanced the impeaching process to justify the attending delay, inconvenience, and possible confusion to the jury.

B. The purposes for which prior contradictory statements are admitted can be fully satisfied by the showing of the fact of contradiction; consequently their exclusion will not normally be an abuse of discretion.

Prior contradictory statements of a witness are relevant to show "a defect of intelligence or memory on the subject testified of, or, what is worse, a want of moral honesty and regard to truth; and so, in either case, that the witness is less worthy of belief." *Commonwealth v. Starkweather*, 10 Cush. (Mass. 1852) 60. See 3 Wigmore, *Evidence* (3d ed. 1940) § 1017. Petitioners at no time indicated that their purpose was broader. Such statements are neither relevant nor competent to show that the first statement is true, and certainly could not be used for such a purpose on cross-examination.

1. *Southern Railway Co. v. Gray*, 241 U.S. 333, 337, and cases cited.

Consequently, if the *fact* of contradiction has been shown in such circumstances as to show "a defect of * * * memory" or "a want of moral honesty" and thus, "that the witness is [not] worthy of belief", with respect to the matter at issue, it is difficult to see what substance the statements themselves would add. They *might*, to be sure, give a certain dramatic emphasis to the witness' oral concessions. Cf. 3 Wigmore, *Evidence* (3d ed. 1940) § 1037. But whatever this emphasis is, it can hardly be different in character from what is called merely "cumulative" evidence. Therefore, its admission or exclusion cannot normally, nor in the circumstances of this case, amount to a clearly "prejudicial abuse of discretion." *Michelson v. United States*, 335 U.S. at 480.

2. There is a difference of opinion among the states⁶ which plainly suggests that the value of

⁶ See 3 Wigmore, *Evidence* (3rd ed. 1940, and Supp., 1949), §1037 nn. 4,5, where there is a general survey of the state cases and statutes bearing upon this problem. Dean Wigmore lists the following cases as holding that the mere fact that the witness admits having made the contradictory statement "does not prevent" the opponent from offering it in evidence by his own witnesses: *Lewis v. Post*, 1 Ala. 69; *Singleton v. State*, 39 Fla. 520 (with doubt); *Hathaway v. Crocker*, 7 Mete. (Mass.) 262; *Markel v. Moudy*, 13 Nebr. 322, 14 N.W. 409; *Fremont B. & E. Co. v. Peters*, 45 Nebr. 356, 63 N.W. 791; *People v. Schainuck*, 286 N.Y. 161, 36 N.E. 2d 94.

On the other hand, he states that the following courts have "conceded" that an admission by the witnesses does exclude further proof of contradiction: *Crowley v. Page*, 7 C. & P. 789; *Ray v. Bell*, 24 Ill. 451; *Atchison, T. & S. F. R. Co. v. Feehan*, 149 Ill. 202, 214, 36 N.E. 1036; *Swift v. Madden*, 165 Ill. 41, 45 N.E. 979; *Illinois C. R. Co. v. Wade*, 206 Ill. 523, 69

prior contradictory statements, after admission of the fact of contradiction, is sharply disputed. Further, the value of any particular contradictory statement will vary, and be sharply disputed, from case to case. In these circumstances, it is clear that the necessity of producing a statement in a particular case in the federal courts—where rules of evidence are not rigidly codified—will depend on those “numerous and subtle considerations difficult to detect or appraise from a cold record” (335 U.S. at 480)—which this Court in *Michelson* held required deference to the discretion of the trial court.

The federal cases support that view. Thus, in *Boehm v. United States*, 123 F. 2d 791 (C.A. 8), certiorari denied, 315 U.S. 800, the trial court’s refusal to furnish appellant with a transcript of the pretrial testimony of government witnesses who had testified differently at the trial was upheld because each witness had been cross-examined at length and it had been brought out that they had earlier attempted to deceive the investigators. The court concluded (123 F. 2d at 807):

Here appellant was accorded the right to and did cross examine at length and without any unreasonable limitation about what the impeached witnesses did or did not tell the investigators prior to the trial * * *. We have

N.E. 565; *Chicago & E. I. R. Co. v. Crose*, 214 Ill. 602, 73 N.E. 865; *State v. Goodbier*, 48 La. Ann. 770, 19 So. 755; *State v. Folden*, 135 La. 591; *State v. Cooper*, 83 Mo. 698; *Barnard v. State*, 45 Tex. Cr. App. 67, 73 S.W. 957; *Rice v. State*, 50 Tex. Cr. 648, 100 S.W. 771; *Schwam v. Reece*, 210 S.W. 2d 903 (Ark); *Commonwealth v. Runick*, 318 Mass. 45, 60 N.E. 2d 353.

found no case supporting appellant's contention that there was reversible error in the court's refusal to compel production of the transcripts * * * under such circumstances as are presented here.

The situation in *United States v. Muraskin*, 99 F. 2d 815 (C.A. 2), was similar. Appellants had been found guilty on the exclusive testimony of an accomplice who in an earlier proceeding had told a different story. On cross-examination he repudiated his previous version, and appellants asked for a written statement of the original account. The Court of Appeals upheld the trial court's denial of this request, concluding that (99° F. 2d at 816):

[The requested statement] was competent only in further contradiction of ~~that~~ [the witness] Shecter had just said on the stand; and both his testimony in bankruptcy and his cross-examination as to the substance of the supposititious statement itself had already contradicted that. To these the record could have added nothing of any consequence. * * * He has no privilege to rummage at will through the papers of the prosecution on the chance of turning up something favorable * * *.⁷

See also, *United States v. De Normand*, 149 F. 2d 622 (C.A. 2), certiorari denied, 326 U.S. 756; *United States v. Walker*, 190 F. 2d 481 (C.A. 2), certiorari denied; 342 U.S. 868; and *United States*

⁷To the same effect, *Alto v. State*, 215 Wis. 141, 253 N.W. 717; *Chicago & E. I. R. Co. v. Crose* 214 Ill. 602, 613, 73 N.E. 865; cf. *State v. Folden*, 135 La. 591, 66 So. 223.

v. *Rosenfeld*, 57 F. 2d 74 (C.A. 2), certiorari denied, 286 U.S. 556.

On the other side, petitioners cite two cases which purportedly point the other way. *United States v. Krulewitch*, 145 F. 2d 76 (C.A. 2), and *Heard v. United States*, 255 Fed. 829 (C.A. 8).⁸ Of these only *Krulewitch* can be deemed of significance, in view of the more recent decision of the Court of Appeals for the Eighth Circuit in *Boehm v. United States*, *supra*, which indicated that that court had not intended in *Heard* to lay down a fixed rule re-

⁸ Petitioners also cite *Alford v. United States*, 282 U.S. 687, in this connection. That case did not involve a prior contradictory statement. More important, the trial court there cut off cross-examination completely with respect to the fact that the witness was in prison. That ruling cannot be important where the question is *how much* evidence on a particular point is to be permitted.

Asgill v. United States, 60 F. 2d 776 (C.A. 4), on which petitioners also rely, has some very broad language about the purposes of cross-examination and the nature of matter which should therefore be available to the cross-examining counsel. But in that case, the court was not dealing *merely* with the admission of the prior contradictory statement of a witness who had admitted the fact of contradiction. The witness admitted that the earlier statements were in fact false. But she had, on direct examination, denied that she had written the statements at all, contending that she could neither read nor write, and that she had merely authorized the actual writer to write anything he saw fit in her behalf. Later in the trial, she had admitted her signature to various letters and upon inspection of one of them admitted that she could read it. And, still later, it was shown that she was present when one of the letters was orally dictated.

In these circumstances, it is not surprising that the Court of Appeals should have thought that the letters should have been produced for purposes of "exploratory" cross-examination "to test the witness in matters of recollection, of prejudice or bias, and of truthful statement." 60 F. 2d at 779. There is a difference in kind between using a prior contradictory statement for emphasis, and using it as part of the proof of the fact of contradiction when that is denied.

quiring production of prior statements where the fact of contradiction had otherwise been adequately shown.

Krulewitch does hold that the mere fact that prior contradiction has been shown does not in itself necessarily justify refusal to require production of a prior contradictory statement. But, on analysis, *Krulewitch* went no farther than to hold that in the particular circumstances of that case, apparent even from the cold record, the refusal to require production of the prior contradictory statement was error.

In that case the defendant was charged with having transported a woman in interstate commerce for purposes of prostitution. One of the principal prosecution-witnesses was a woman who, some 13 months before trial had given a signed statement to the F.B.I., completely and expressly exculpating the defendant. At the trial the woman proved to be a very erratic witness, hysterical, uncooperative and abusive. The defendant's counsel demanded production of the statement; the trial judge examined it and then refused to allow the defendant to examine it. The Court of Appeals, Judge Clark dissenting, held that such denial was reversible error. The court observed that, although the witness on cross-examination had sworn that the statement she had given the F.B.I. was false throughout, "such testimony has never been regarded as an equivalent of the contradictory statement itself." In holding the error prejudicial, the court further stated, "The statement professed to

be a complete account of [the witness'] dealings with the accused, and left him scatheless. [The witness] herself was shown to be to the last degree untrustworthy; and we surely cannot say that this circumstantial story so totally at variance with her testimony, might not have created enough doubt to turn the scales in favor of the accused." 145 F. 2d at 79.

If the *Krulewitch* case is (as we urge, merely a holding that in the circumstances the ruling of the trial judge was an abuse of discretion,⁹ it has no significant relevance here, for the circumstances of the instant case are substantially different. It may well be that, when a court is dealing with so completely erratic a witness as the *Krulewitch* witness, the only safe or fair course is to demand that anything material to her credibility be admitted. It may be that when a court is dealing with such a nearly-hysterical witness, it should recognize the possibility that the jury must judge a person whose emotional level is likely to be beyond the normal

⁹ But cf. the dissent of Judge Clark, 145 F. 2d at 82:

"Here the discretion of the trial judge was carefully and, I believe, wisely exercised. The * * * witness had been subjected to the most lengthy cross-examination by both this accused and his codefendant and had become hysterical and rather offensive in her conduct, although the repetitive questions for the codefendant were an extreme test of patience. At any rate, she freely admitted that she had given a statement to the government agent in conflict with her present testimony, wherein she had exonerated this accused * * *. This witness had been discredited, therefore, & much as was possible; delivery up of the statement would have added no new factor, but would undoubtedly have simply added pages more to the record of bickering of the kind already had *ad nauseam*. The circumstances suggest the necessity of upholding, not constricting, the trial judge's control of such a situation."

range of its community experience. And, therefore, it may be error to cut off cross-examination of such a person at a point where, for more apparently normal persons, such cut-off would be a proper exercise of discretion. In short, it may be that a court has a duty to guide more carefully a jury which must determine the degree of credibility to be attached to a story by an erratically incredible witness. And it may be that this, in substance, is what the *Krulewitch* majority meant when, in justification of its holding, it observed that the witness "herself was shown to be to the last degree untrustworthy" (145 F. 2d at 79).

Moreover, it seems clear that the statements in this case did not, as in *Krulewitch*, directly relate to and exculpate the defendant; the differences were of omission rather than of flat contradiction. Thus, the "subtle considerations" (335 U.S. at 480) in the two cases are of an entirely different character.

If, on the other hand, the majority of the Court of Appeals for the Second Circuit intended to lay down a flat rule that a prior contradictory statement is in all circumstances admissible, then it was attempting to import into federal criminal practice a type of rigidity which is both new and undesirable,¹⁰ and which is contrary to the basic principles to which this Court gave expression in the *Michelson* case.¹¹

¹⁰ See dissenting opinion of Judge Clark, 145 F. 2d at 81, and cases cited.

¹¹ Inasmuch as there were other independent grounds for reversal in *Krulewitch*, the decision was not an appropriate one for review in this Court of the particular issue here involved.

C. *The fact that the issues herè arose on a motion to produce does not affect the disposition of the case*

The question whether Marshall's statements should have been produced is no different from the question whether their admission as prior contradictory statements was required. For there is no contention that they were admissible in the absence of the contradiction.¹² This Court has explicitly held that a "large discretion must be allowed the trial judge" with respect to the production of documents. *Goldman v. United States*, 316 U.S. 129, 132. This is so even where the document has been used at the trial to refresh a witness' recollection. *United States v. Socony-Vacuum Co.*, 310 U.S. 150, 231-237. Cf. *Lennon v. United States*, 20 F. 2d 490 (C.A. 8); *Little v. United States*, 93 F. 2d 401 (C.A. 8). *A fortiori*, documents not used at the trial in any way are not automatically subject to production.¹³

¹² Petitioners rely upon a group of cases, principally in the Second Circuit, which have held it error to exclude pertinent documents solely because they were in Government files. *Edwards v. United States*, 312 U.S. 473; *United States v. Andolschek*, 142 F. 2d 503; *United States v. Zwillman*, 108 F. 2d 802; *United States v. Grayson*, 166 F. 2d 863; *United States v. Beekman*, 155 F. 2d 580. But the doctrine of these cases is not in issue. The exclusion is not sought to be justified on the ground of privilege, but because the fact of the contradiction had been sufficiently shown.

¹³ Even with respect to the production of documents required by F. R. Crim. P. 16, the matter is left to the discretion of the trial court. The Rule provides that such papers "may" be ordered produced; and the Reviser's Notes to the Rule explicitly states that "[the] entire matter is left within the discretion of the court."

In addition, it may be noted that the Rule provides for access

There is support for the view that the better practice in disposing of motions to produce is for the court to examine the document itself. See, *e.g.*, *United States v. Krulewitch*, *supra*. Petitioners, however, did not request the trial court to make any independent examination of the Marshall statements. Nor did they request the trial court to make the statements a part of the record on appeal. See *United States v. Rosenfeld*, 57 F. 2d 74, 76, certiorari denied, 286 U.S. 556; *United States v. Ebeling*, 146 F. 2d 254, 256-257. Compare *United States v. Beekman*, 155 F. 2d 580, 584. A trial judge who fails *sua sponte* to examine a document which does not seem to him of significant importance cannot be held to have abused his discretion.

III

Refusal to Admit the Statement of the Detroit Judge to Marshall Was Not, in the Circumstances of This Case, Such a Clear Abuse of Discretion as to Warrant Reversal by This Court

There is, in our view, a more serious question of abuse of discretion on this issue than on the issue discussed in Point II, *supra*. We believe, however, that there is support for the position that even here the trial judge did not abuse the discretion accorded him in matters of cross-examination.

only to papers "obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable." In the first draft of this Rule, provision was made for the discovery of papers "not privileged." Cf. Clark, J., dissenting, in *United States v. Krulewitch*, 145 F. 2d 80, 82. The change reflects a still prevalent reluctance to grant defendants access too broadly, even with discretionary controls, to the Government's case preparations.

A. The admission of the statement of the Detroit judge would not have made available to petitioners any substantial evidence which was not before the jury.

Petitioners' second major argument is that the trial court abused its discretion in refusing to permit them to introduce in evidence a statement made by a Detroit judge to Marshall. The statement, see *supra*, p. 9, (a) accepted Marshall's plea of guilty, (b) recited that the case was being referred to the probation authorities, (c) recited the fact that the judge had stated that it seemed to him that if Marshall expected a favorable recommendation from the probation authorities, it would be essential that he satisfy those authorities that he had given full information in this proceeding, (d) observed that, as a tremendous amount of film was involved, it was important for the law enforcement authorities to apprehend all those who participated, and (e) cautioned that "I am not holding out any promises," but "I think that you would be well advised to tell the * * * whole story even though it might involve others" (R. 199).

The purpose of this offer of proof seems to have been to show that Marshall had a motive for testifying that was prejudicial to petitioners, and specifically, that he was hoping for the reward, by virtue of his testimony, of a lighter sentence or probation (R. 199-200).

The trial judge ~~did~~ not state explicitly the basis for his exclusion of this evidence (R. 200). Presumably, he thought it would not have been an in-

ducement to lie. See pp. 37-39, *infra*. Also, he had indicated that he thought he had permitted Marshall to be asked a sufficient number of questions relative to his hope of special treatment (R. 197-198). And in later cross-examination, both on the Government's case-in-chief and on rebuttal, he permitted petitioners' counsel to bring out the fact that Marshall had pleaded guilty, and at the time of the trial was still unsentenced:

[By Mr. Callaghan]

Q. You are not a defendant in this proceeding?

A. No, sir.

Q. The only proceeding in which you were a defendant was in Detroit, Michigan?

A. That's right, sir.

Q. And it is over 9 months now that your plea in Detroit has been pending, and is undisposed of, and you have not been sentenced in that, have you?

A. No, sir.

Q. And there is not even a date set for your sentence, is there?

A. I don't believe so. [R. 210.]

* * * * *

[By Mr. Walsh]

Q. Mr. Marshall, you have stated now on direct and on cross-examination—I am not sure it was gone into on direct—that you have not been given any promises for your testimony. Is that right?

A. That is right.

Q. Any promise of immunity or reward. Is that true?

A. That is true.

Q. But you have not been sentenced?

A. No, sir.

Mr. Downing: I object.

[By Mr. Walsh]

Q. In connection with this plea of guilty, is that right?

A. No, sir. [R. 221.]

* * * * *

[By Mr. Walsh]

Q. You have plead guilty to a felony?

[Objection by prosecution overruled.]

A. What?

Q. You have pleaded guilty to a felony under the laws of the United States, have you not?

A. Yes, sir.

Q. You are unsentenced for the felony, is that right?

A. That is right. [R. 422.]

The inference that the witness was in a position calling for cooperation with the government is inescapable. Any jury would have made it and would have taken that circumstance into account in weighing his testimony. The excluded statement by the Detroit judge would have disclosed merely that Marshall had been advised to cooperate fully and to tell the whole story of the crime if he expected any leniency in his sentence. It would have added nothing that would not be self-evident as

soon as it was brought to the jury's attention that Marshall was awaiting sentence.

Answer to petitioners can be made even more particularly. They attach special significance to the fact that the judge made the statement. They apparently feel that knowledge that "inducement" ran from the judge would have impressed the jury. But the point hardly needed this emphasis. It was plainly called to the jury's attention that Marshall's plea of guilty was nine months' old at the time of petitioners' trial. This was an unusual delay and the jury must have known it. They must have known too that it could not have been countenanced without tacit or express consent of the trial court. And, to underline the matter further, petitioners' counsel called their attention to the fact that a date had not even been set for sentencing (R. 210).¹⁴ As we have noted, the purpose of the offer of the Detroit statement was to show that Marshall had a motive to testify that was prejudicial to petitioners. But, of course, petitioners' assertion that the statement had any such effect is not binding on a court. And the court below apparently did not believe the statement was in any way

¹⁴ Moreover, counsel for both petitioners clearly emphasized in their summations to the jury that Marshall had pleaded guilty nine months before trial, but was still unsentenced; and therefore had a motive to please the prosecution. And counsel for petitioner, Gordon, made a detailed argument on Marshall's testimony carefully pointing out the fact that Marshall's early statements did not implicate petitioners; and that the final statement implicating them came only after his August 14 plea of guilty. These summations are not in the printed record, although they were part of the Record on Appeal to the Court of Appeals. They will be filed with the Clerk of this Court.

an inducement to testify falsely. (See R. 200, and see opinion of court of appeals, R. 499.)

Whether the court was right or wrong if the statement is taken alone, there is certainly no substantial basis for arguing that the statement adds significant weight to those considerations which the cross-examination fully brought out.

B. The trial court could reasonably have thought that admission of the statement of the Detroit judge might have required consideration of matters which would have diverted the attention of the jury without compensating light on the matters at issue.

The trial judge's decision to exclude the Detroit statement can also be justified as an attempt on his part to prevent further and undue complication of the trial.

The trial judge might well have concluded that the Detroit statement offered no particular incentive to Marshall to lie with respect to the petitioners, not because judges' statements to prisoners in dock never have such effect, but because, in the circumstances of this case, they probably did not have such effect. He might also have thought that on its face the statement would give the jury a misleading impression.

There were only two ways to assure that the statement was not improperly used. One was to admit it, and then permit comment on or a presentation of those facts which showed that the statement was not in this case an inducement to lie about the petitioners. The other was to exclude the statement altogether.

The first alternative might have called for redirect examination as to whether Marshall understood it as an inducement to name people who were not involved. It might have called for redirect as to whether Marshall had any special reason for singling out the petitioners, Gordon and MacLeod, as additional persons to name. It might have called for redirect as to whether Marshall had reason to know whether the F.B.I. knew of the possible involvement of the petitioner, MacLeod (as was the fact, R. 276-278), or of the petitioner, Gordon. It might have called for redirect as to whether the crime was of such magnitude as reasonably to have required a large number of people. It might even have called for redirect as to the function of the probation officer's recommendation.

These and perhaps other issues would have been relevant to Marshall's motives to lie. The trial judge below might well have concluded that in these circumstances, the sensible thing to do was restrict proof to the presentation of the facts which showed all that was reasonably inferable from the judge's statement anyway, and did not as clearly call for diverting answer.¹⁵

Whether such an analysis of the risk that this would be required would have been right or wrong is not important. It would have been a reasonable forejudgment made in the immediacy of the trial, and could not, as a matter of fact, have caused prejudice to the petitioners.

¹⁵ There is of course no inconsistency in saying that the Detroit judge's statement would have added nothing to what had gone before, and yet might have been important enough to require explanation.

C. Cases dealing with limitations on the scope of cross-examination show (1) that once the basic factors reflecting on a witness' credibility have been brought to the attention of the jury, admission or exclusion of further evidence on the point rests largely within the discretion of the trial court, and (2) that the exercise of discretion with respect to the Detroit statement was well within the commonly applied standards of propriety.

This Court stated the clearly controlling rule, with respect to cross-examination directed at impeachment, in *Alford v. United States*, 282 U.S. 687, 694, as follows:

The extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court. It may exercise a reasonable judgment in determining when the subject is exhausted.

See *United States v. Tandaric*, 152 F. 2d 3 (C.A. 7); *United States v. Hornstein*, 176 F. 2d 217 (C.A. 7). The rule is simply an application of the doctrine consistently affirmed by this Court that the extent of cross-examination "rests in the sound discretion of the trial court." *E.g., Glasser v. United States*, 315 U.S. 60, 83.

In application of this principle, however, it has been properly recognized that there is a difference between cutting off all testimony on a particular showing of bias, and cutting off merely cumulative testimony of such bias. Compare *Alford v. United States*, *supra*, with *United States v. German-*

American Vocational League, 153 F. 2d 860 (C.A. 3), certiorari denied, 329 U.S. 760, and *United States v. Stochr*, 100 F. Supp. 143, 156 (M.D. Pa.).¹⁶

The scope of the trial court's discretion in limiting cross-examination is elucidated by the only recent federal criminal cases in which the trial court's discretion, in controlling the extent of cross-examination, has been set aside. Thus, in *District of Columbia v. Clawans*, 300 U.S. 617, this Court held it error to refuse to allow any questioning of five prosecution witnesses directed at showing mistaken identity and seeking to impeach the credibility of the witnesses. The Court observed (300 U.S. at 632):

¹⁶ The cases cited by petitioners concern cutting off all testimony on a particular showing of bias, and therefore do not control the present case.

Alford v. United States, 282 U.S. 687, held that it was improper to cut off *in limine* all questioning concerning the witness' residence, business, etc., which was to have shown that he was in the custody of federal officials and therefore might have a motive to testify as the government wished him to. Cross-examination was not merely limited. On an important and proper subject it was entirely foreclosed. *Sandroff v. United States*, 158 F. 2d 623 (C.A. 6), and *Farkas v. United States*, 2 F. 2d 644 (C.A. 6), involved similar situations. In *Sandroff*, the trial judge had cut off all cross-examination directed at learning why the witness had been named a co-defendant but not indicted, and whether he had been promised immunity. In *Farkas*, it was held error to exclude all testimony that an accomplice-witness had pleaded guilty, but as of the time of trial had not been sentenced. Abuse of discretion was found in *Meeks v. United States*, 163 F. 2d 598 (C.A. 9), because the trial court not only excluded evidence showing that the chief government witness was on parole at the time he testified but also refused, on the court's own motion, to allow the witness to answer questions on cross-examination relating to his previous sentence and current parole status.

[T]he prevention, throughout the trial of a criminal case, of *all* inquiry in fields where cross-examination is appropriate, and particularly in circumstances where the excluded questions have a bearing on credibility and on the commission by the accused of the acts relied upon for conviction, passes the proper limits of discretion * * *. [*Italics supplied.*]

In *Arnold v. United States*, 94 F. 2d 499 (C.A. 10), cross-examination of two accomplice-witnesses who had admitted prior convictions was cut off when counsel sought to ascertain the nature of their felonies. This was held to be error since, in the circumstances of this case, it was vitally important in impeaching their credibility to show conviction of a crime involving moral depravity, so that there cross-examination was terminated before it could reach the truly relevant impeaching factor. In *Lindsey v. United States*, 133 F. 2d 368 (C.A. D.C.), the trial court had thwarted the defense's repeated efforts to show on cross-examination that government mental experts' testimony concerning defendant's sanity at the time of the trial was inaccurate and misleading. Since insanity was the sole defense relied upon, the Court of Appeals held it reversible error to prevent all cross-examination going to the refutation of the prosecution's mental testimony. In *Dickson v. United States*, 182 F. 2d 131 (C.A. 10), where false representation as a United States officer was an element of the offense to be proved, it was held error to prohibit any cross-examination of the principal

government witness as to the conversation during which the alleged false representations were made. In *J. E. Hanger, Inc. v. United States*, 160 F. 2d 8 (C.A. D.C.), no cross-examination whatsoever had been permitted. The inference is strong that the range of reviewability in this area is narrow. Only where the cross-examiner has been prevented from bringing out matter relevant to the central issue of the case, or not allowed even to bring out essential impeaching factors, have there been findings of abuse of discretion.¹⁷

On the other hand, a considerable number of cases have affirmed the trial court's discretion to limit cross-examination once fairly begun in a variety of circumstances: *Shama v. United States*, 94 F. 2d 1 (C.A. 8), certiorari denied, 304 U.S. 568 (cross-examination of a government witness with regard to her illicit relations with various men cut off because other testimony showed her immorality); *Hider v. Gelbach*, 135 F. 2d 693 (C.A. 4) (cross-examination cut off after ten questions on a particular point); *Girson v. United States*, 88 F. 2d 358 (C.A. 9), certiorari denied, 301 U.S. 697 (cross-examination cut off because in the view of the trial judge the subject was substantially

¹⁷ Petitioners' reliance on the *Alford* line of cases suggests that they think that in some way cross-examination was cut off *in limine* (see Br. 21-28). But the fact that a particular inquiry is not permitted is not enough to invoke *Alford*. A subject matter of inquiry must be cut off. If the consequence of the refusal to admit the Detroit statement were that there was no showing of bias, then we would have an *Alford* situation. But the facts out of which bias arose were clear, and this subject matter was not cut off. Only the amount and kind of evidence on a subject matter fully exposed was limited.

exhausted); *United States v. Hunt*, 126 F. 2d 592 (C.A. 7), certiorari denied, 314 U. S. 625 (cross-examination was limited to matters already before the jury in other evidence); *United States v. Ginsburg*, 96 F. 2d 882 (C.A. 7), certiorari denied, 305 U.S. 620, (cross-examination of a witness who had admitted taking dope cut-off when witness was asked where he got it, because the inquiry was thought to be "collateral"); *Touhy v. United States*, 88 F. 2d 930 (C.A. 8), certiorari denied, 316 U.S. 702 (court stopped defense from asking a witness what his purpose was in testifying for the government, because he had already been asked what promises of immunity and other benefit he had received); *Gates v. United States*, 122 F. 2d 571 (C.A. 10), certiorari denied, 314 U.S. 698 (court refused to let defendants introduce letters showing a government witness intended to enter into business competition with them and so might have a motive to lie, because evidence had already been admitted on the point); *Goldstein v. United States*, 63 F. 2d 609 (C.A. 8) (court prevented questioning on cross-examination directed at showing prices received for furs sold at auction, the purpose of such questioning being to show that defendant, who was being tried for using the mails to defraud, had not been paying too low a price to the trappers whom he allegedly was defrauding, because it was not sufficiently clear that the dates on which those prices were shown were close enough to be controlling). See also: *Holmes v. United States*, 134 F. 2d 125, 134-135 (C.A. 8), certiorari denied, 319 U.S. 776; *Rose v. United States*, 128 F.

2d 622, 625-626 (C.A. 10); *Madden v. United States*, 20 F. 2d 289 (C.A. 9).

It is true that exercises of discretion with respect to basically factual problems necessarily make decision from case to case very largely *ad hoc*. But out of repeated applications of judgment to similar demands of a "fair trial", standards, however incapable of explicit expression, can nevertheless be drawn.

We think that the bases on which this record supports the exclusion of the Detroit statement on cross-examination are at least as adequate as those which can be invoked to explain the exclusions in the cases just noted. As the court of appeals here said (R. 500), "We cannot believe that the failure to admit the [Detroit] transcript could, in the slightest degree, have prejudiced the jury, which had before it the undisputed facts in this respect. * * * [T]his record reflects a most thorough cross-examination as to all Marshall's actions and motives. * * * The offered evidence threw no further light upon or impeached in any way what he had already said. * * * [I]t was not prejudicial error for the court to exclude the transcript; it was not abuse of the discretion, concerning the scope and limitation of cross-examination, with which the trial court is endowed."

In almost all of the cases above noted it could have been urged that the particular examination cut off deprived the party of emphasis that would have impressed the jury.¹⁸ As it is impossible to

¹⁸ *Shama v. United States*, 94 F. 2d 1 (C.A. 8), is an example. That was a prosecution for violation of the White Slave Act

ascertain just what quanta of evidence or what points, can win or lose a jury, there is in every such ruling a risk of prejudice. But in those cases, and in the present, the exclusion did not, we submit, amount to a "clear showing of prejudicial abuse of discretion". *Michelson v. United States*, 335 U.S. at 480.

D. *Any abuse of discretion was substantially ameliorated by the charge to the jury, which called attention to the need to scrutinize carefully Marshall's testimony*

Both as to the exclusion of the statement of the Detroit judge and as to the refusal of the district court to grant the motion to produce the prior inconsistent statements, discussed in Point II, pp. 23-34, *supra*, the judge's charge to the jury substantially satisfied even petitioners' complaints of abuse of discretion in excluding the evidence.

On the basis of the record before this Court, granting either or both of the disputed requests would not have altered the outcome of the trial. The

of 1910. The contested issue was whether the defendant intended to use the woman involved for purposes of prostitution at the time he caused her to cross into the state. Cross-examination of this woman with regard to her illicit relations with one Coots, offered to reflect on her credibility, was cut off because other testimony showed her immorality. As Coots was the person who first brought the woman to defendant's attention, and as he figured importantly in the case, testimony of his relationship with the woman may well, as a practical matter, have been more damaging to her credibility on the crucial issue than other testimony as to her immorality. But without respect to the merits of this issue, the court of appeals thought that the matter was plainly within the discretion of the trial judge. 94 F. 2d at 5.

objective of petitioners in making both requests was to show that the chief government witness was untrustworthy. However, the jury was made fully aware on cross-examination that the witness had failed to implicate petitioners in his earlier accounts of the crime, that he was an accomplice and had plead guilty to a charge of possessing some of the stolen film, and that as of the time of his testifying he was as yet unsentenced. This knowledge without more was sufficient to put the jury on guard. In fact, however, there was more, namely, a careful instruction as to the caution to be used in evaluating the testimony of an accomplice-witness. The relevant portions of the instruction follow (R. 437):

Under the instruction which I have given you heretofore, you should scrutinize carefully the testimony of any witness who, as a Government witness, incriminates himself with others in the offense charged. *The evidence of such a witness ought to be received with the very greatest care and caution*, and subject to the same rules which I have given you governing other witnesses. [Italics supplied.]

The law is that the jury shall consider the testimony of an accomplice and may, if the evidence warrants, find the defendant guilty upon the testimony of any accomplice alone. However, before you would be justified in arriving at a verdict upon the uncorroborated testimony of the witness Marshall alone, you should find his testimony to be clear and convincing, and to possess the characteristics of truth, and

together with all other evidence in the case, convince you beyond a reasonable doubt.

Indeed, this power of the trial judge, by means of his charge to the jury, to adjust and rectify matters which have occurred at the trial, accentuates the necessity of allowing trial judges great latitude, particularly in matters of cross-examination.

CONCLUSION

The right to exercise discretion means the right to make what may later seem to be mistakes. Whether or not any mistakes were made with respect to either of the challenged rulings, this record does not present, as *Michelson* requires, a "clear showing of prejudicial abuse of discretion." It is therefore respectfully submitted that the judgment below should be affirmed.

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